(11)

No. 01-301-CFH
Status: GRANTED

Title: Tom L. Carey, Warden, Petitioner
v.
Tony Eugene Saffold

Docketed:
August 20, 2001

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Cross,Stanley Arthur

Counsel for respondent: McComb,Mary Katherine

NOTE: Opinion amended 5-23-01.

Entry	Date	Note	Proceedings and Orders
1	Aug 20 2001	G	Petition for writ of certiorari filed. (Response due September 19, 2001)
3	Sep 17 2001	X	Brief of respondent Tony Eugene Saffold in opposition filed.
4	Sep 17 2001	G	Motion of respondent for leave to proceed in forma pauperis filed.
2	Sep 26 2001		DISTRIBUTED. October 12, 2001 (Page 2)
5	Oct 3 2001	X	Reply brief of petitioner Anthony Newland filed.
6	Oct 15 2001		Motion of respondent for leave to proceed in forma pauperis GRANTED.
7	Oct 15 2001		Petition GRANTED. SET FOR ARGUMENT February 27, 2002. **********
8	Nov 1 2001	G	Motion of respondent for appointment of counsel filed.
10	Nov 21 2001	D	Motion of respondent to dismiss the writ of certiorari as improvidently granted filed.
9	Nov 26 2001		Motion DISTRIBUTED. November 30, 2001 (page 13)
15	Nov 28 2001		Brief of petitioner Anthony Newland filed.
17	Nov 28 2001		Joint appendix filed.
13	Nov 29 2001		Brief amici curiae of North Carolina, et al. filed.
16	Nov 29 2001		Brief amicus curiae of Criminal Justice Legal Foundation filed.
11	Dec 3 2001		Motion for appointment of counsel GRANTED and it is ordered that Mary Katherine McComb, Esq., of Sacramento, California, is appointed to serve as counsel for the respondent in this case.
12	Dec 3 2001		Motion to dismiss DISTRIBUTED. December 7, 2001 (page 12).
20	Dec 4 2001		Opposition of PETITIONER to motion of respondent filed.
18	Dec 10 2001		Motion of respondent to dismiss the writ of certiorari as improvidently granted DENIED.
19	Dec 11 2001		Time to file respondent's brief on the merits extended to and including January 10, 2002.
21	Dec 14 2001		CIRCULATED.
22	Jan 10 2002	X	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
23	Jan 10 2002	X	Brief of respondent Tony Eugene Saffold filed.
26	Feb 6 2002		Record filed.
		*	Record proceedings from the U.S.C.A. for the 9th Circuit (1 envelope).
25	Feb 8 2002	X	Reply brief of petitioner Tom L. Carey, Warden filed.

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No. 01-301-CFH

Entry	Date	Note	Proceedings and Orders
27	Feb 15 2002		Record filed.
		*	Record proceedings from the U.S.D.C. for the Eastern Dist. of California. RECORD COMPLETE
28	Feb 25 2002		LODGING consisting of documents from two habeas cases submitted by counsel for the respondent.
29	Feb 27 2002		ARGUED.

Supreme Court, U.S.
FILED
AUG 20 2001
OFFICE OF THE CLERK

No. 01-301

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY NEWLAND, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

The Ninth Circuit in *Saffold v. Newland*, 250 F3d 1262 (9th Cir. 2001) has interpreted AEDPA's statute of limitations tolling provision, 28 U.S.C. § 2254(d)(2), to permit a delay of over four and a half months between state court filings despite a state supreme court ruling dismissing the state habeas corpus petition for "lack of diligence." One federal district court has relied upon *Saffold* to toll a delay of 15 months between state court filings. *Saffold's* interpretation of § 2254(d)(2) is in direct conflict with *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000), which concluded that *Saffold's* "understanding of § 2244(d)(2) would sap the federal statute of limitations of much of its effect."

QUESTION PRESENTED

Whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. section 2244(d)(2), the Antiterrorism and Effective Death Penalty Act's tolling provision.

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

ANTHONY NEWLAND, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

_____

OPINION BELOW[1/]

Petitioner respectfully petitions for a writ of certiorari to review the May 23, 2001, order and opinion of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") in *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001) (No.99-15541) (hereafter "*Saffold*") (Appendix A), which amended and superceded the Ninth Circuit's July 17, 2000, opinion reported at 224 F.3d 1087 (9th Cir. 2000) (Appendix B) and reversed the judgment of the United States District Court for the Eastern District of California that dismissed Respondent's application for a writ of habeas corpus. Respondent is a prisoner in state custody pursuant to a judgment of conviction in the Superior Court of the State of California for first degree murder, assault with a firearm, and robbery.

Petitioner has included the following orders and opinions as Appendices: (A) the Ninth Circuit's May 23, 2001,

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1. This section contains the citations required by Rule 14(d) of the Rules of the Supreme Court of the United States.

Saffold order and opinion; (B) the Ninth Circuit's July 17, 2000, superceded *Saffold* opinion; (C) the Ninth Circuit's June 4, 2001, order granting Petitioner's motion for stay of mandate; (D) United States District Court Judge David F. Levi's February 25, 1999, order granting a certificate of appealability limited to the issue of whether Saffold's "application is barred by the statute of limitations contained in 28 U.S.C. § 2244(d)(1)"; (E) United States District Court Judge David F. Levi's January 6, 1999, order adopting the Findings and Recommendations of the magistrate judge in full and dismissing Respondent's application for writ of habeas corpus; (F) United States Magistrate Judge John F. Moulds's November 3, 1998, Findings and Recommendations that the application for writ of habeas corpus be dismissed; and (G) the California Supreme Court's May 27, 1998, denial of Respondent's petition for writ of habeas corpus.

STATEMENT OF JURISDICTION

On May 23, 2001, the Ninth Circuit entered its judgment in *Saffold* and denied rehearing and rehearing en banc. (Appendix A.) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States to resolve the conflict between *Saffold* and *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000) and to settle an important question of federal law.

THE STATUTE INVOLVED IN THE CASE

28 U.S.C. § 2244(d) sets forth the following one-year statute of limitations period and tolling provision for an application for a writ of habeas corpus by a state prisoner held in custody pursuant to the non-capital judgment of a state court:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

On April 3, 1990, Respondent was found guilty in California state court of murder, assault with a deadly weapon, two counts of robbery, and findings of firearm use associated with the murder and robberies. His conviction became final on April 20, 1992.

On April 17, 1997, seven days before the

Antiterrorism and Effective Death Penalty Act (AEDPA) one-year statute of limitations would have expired,[2/] Respondent filed his first state petition for writ of habeas corpus with the San Joaquin County Superior Court by delivering the petition to prison authorities.[3/] The petition was denied by the San Joaquin County Superior Court on June 9, 1997.

On June 14, 1997, Respondent delivered a petition for writ of habeas corpus to prison authorities to be filed with the California Court of Appeal, Third Appellate District. The petition was filed on June 17, 1997, and denied by the Third Appellate District on June 26, 1997.

On November 13, 1997, after waiting over four and one-half months, Respondent filed a petition for writ of habeas corpus with the California Supreme Court, which denied the petition on May 27, 1998, "on the merits and for lack of diligence." (Appendix G.)

On June 4, 1998, Respondent filed an application for writ of habeas corpus in the United States District Court, Eastern District of California (Sacramento). The district court's jurisdiction was conferred by 28 U.S.C. § 2254.

On August 28, 1998, Petitioner filed a motion to dismiss on the ground that Respondent's application for writ of habeas corpus was barred by the statute of limitations set forth in 28 U.S.C. § 2244(d).

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2. In *Patterson v. Stewart*, 251 F.3d 1243, 1245-1246 (9th Cir. 2001), the Ninth Circuit recently joined all other circuits which have considered the issue and held that "AEDPA's one-year grace period for challenging convictions finalized before AEDPA's enactment date is governed by Rule 6(a) and ended on April 24, 1997 in the absence of statutory tolling."

3. Petitioner does not contest *Saffold*'s holding that the mailbox rule set forth by this Court in *Houston v. Lack*, 487 U.S. 266, 276 (1988), applies to habeas petitions filed under the AEDPA and applies, "for purposes of calculating the AEDPA limitation period, to the filing of Saffold's petition to state court that began the period of tolling." *Saffold*, 250 F.3d at 1268.

On November 3, 1998, the magistrate judge filed his findings and recommendations that Petitioner's motion to dismiss be granted and that the case be closed. (Appendix F.)

On January 6, 1999, the district court adopted the findings and recommendations in full, granted Petitioner's motion to dismiss and ordered the case dismissed. (Appendix E.)

On February 25, 1999, the district court granted a certificate of appealability limited to the issue of whether Respondent's "application is barred by the statute of limitations contained in 28 U.S.C. § 2244(d)(1)." (Appendix D.)

On July 17, 2000, the Ninth Circuit filed *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000) reversing the district court's dismissal of the case. (Appendix B.)

On July 31, 2000, Petitioner filed a petition for rehearing and suggestion for rehearing en banc.

On May 23, 2001, the Ninth Circuit filed an order denying the petition for rehearing and suggestion for rehearing en banc, and filed *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001), which amended and superceded the July 17, 2000, opinion. (Appendix A.)

On June 4, 2001, the Ninth Circuit filed an order granting Petitioner's motion for stay of mandate. (Appendix C.)

ARGUMENT

THE NINTH CIRCUIT HAS IMPROPERLY INTERPRETED AEDPA'S STATUTE OF LIMITATIONS TOLLING PROVISION IN A MANNER THAT IS INCONSISTENT WITH CONGRESSIONAL INTENT, THEREBY CREATING A CIRCUIT CONFLICT WHICH THIS COURT SHOULD RESOLVE

Five years after his state court direct appeal became final, and seven days before the one-year AEDPA statute of limitations period expired, Respondent filed his first state habeas corpus petition in superior court (alleging ineffective assistance of counsel). Five days after the superior court denied his petition on the merits, Respondent filed the identical petition with the state appellate court by delivering the petition to prison authorities. Following a summary denial of the petition by the state appellate court, Respondent waited over four and a half months before he filed his ineffective assistance claim with the California Supreme Court, which denied the petition "on the merits and for lack of diligence."

After Respondent's federal application for writ of habeas corpus was dismissed as untimely under AEDPA's statute of limitations, the Ninth Circuit reversed the district court and held that, when a California Supreme Court ruling dismissing a habeas corpus petition for untimeliness alternatively addresses the merits, AEDPA's statute of limitations period is tolled from the filing of the state petition in the trial court until the California Supreme Court's denial of the habeas petition, including gaps between the filing of the petitions. Appendix A at 8-13; *Saffold*, 250 F.3d at 1265-1268; Appendix B at 6-10; *Saffold*, 224 F.3d at 1088-1091.

Judge O'Scannlain's dissenting opinion in *Saffold* argued that, "[i]n a case involving such dilatory behavior as this, . . . the clock must continue to run in the periods of excessive delay between the three separate habeas petitions." Appendix A at 15; *Saffold*, 250 F.3d at 1269; Appendix B at 12-13; *Saffold*, 224 F.3d at 1091-1092. Judge O'Scannlain explained that:

> Under any method of review, Saffold's delay falls substantially outside the period that *Nino*[4] tolls for "properly pursu[ed]" state post-conviction remedies. 183 F.3d 1006. The majority ignores the California Supreme Court's dismissal, stating that it should have justified its decision by providing "additional explanation or citation to authority." Maj. Op. at 6523. I cannot participate in the majority's attempt to tell the California Supreme Court how to deal with dilatory petitions. Saffold had obviously dallied months longer than the time allotted under California rules. Regrettably, the majority presumptuously and inappropriately purports to trump the procedural rules of the highest court of a sovereign state. By overlooking Saffold's delay in this case, the majority eviscerates the language in the fourth footnote of the *Nino* decision. What, if not a case such as this, pray tell, would satisfy the majority that a petitioner had violated *Nino*?

Appendix A at 17; *Saffold*, 250 F.3d at 1270; Appendix B at 14; *Saffold*, 224 F.3d at 1092.

Although the *Nino* court held "that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge" (*id.* at 1006), the *Nino*

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4. *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999).

court qualified the holding by concluding "that, for purposes of § 2244(d), the time must be tolled for the entire period in which a petitioner is **appropriately pursuing** and exhausting his state remedies." *Id.* at 1004, emphasis added. The *Nino* court explained that:

> Because the statute of limitations was tolled during the period in which Nino was **properly pursuing** his state post-conviction remedies, the district court erred in dismissing Nino's federal habeas petition as untimely. . . . On March 11, 1997, the Los Angeles Superior Court denied Nino's first petition. On April 23, 1997, he filed a habeas petition in the California Court of Appeals [sic]; that petition was denied on May 1, 1997. On May 20, 1997, he filed a petition with the California Supreme Court, which was denied on August 27, 1997. Because he was **properly pursuing** his state collateral remedies,[FN4] AEDPA's statute of limitations was tolled until the California Supreme Court denied his petition for review of the court of appeals' [sic] denial of his habeas petition.

Id. at 1006-1007, emphasis added. In footnote 4, the *Nino* court noted that:

> [W]e express no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims. *See In re Robbins*, 959 P.2d 311, 317-18 (Cal.1998); *In re Clark*, 855 P.2d 729, 745 (Cal.1993) . . . .

Nino at 1006, fn. 4.

By eviscerating footnote 4 of *Nino* (thereby

eliminating *Nino's* requirement that a petitioner be "**appropriately pursuing** and exhausting his state remedies" in order to be allowed tolling under AEDPA), the majority opinion in *Saffold* has improperly diluted the statute of limitations imposed by Congress by interpreting AEDPA's tolling provision in a way that is inconsistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000); *Melancon v. Kaylo*, No. 00-30439, ____ F.3d ____, 2001 WL 822453, at *4 (5th Cir. Aug. 6, 2001). In short, the *Saffold* opinion allows tolling for any length of time despite a petitioner's dilatory behavior and a state court rejection of the petition on the ground of delay as long as the state court also addresses the merits of the claim. Appendix A at 11-13; *Saffold*, 250 F.3d at 1267-1268; Appendix B at 9-10; *Saffold*, 224 F.3d at 1090.

Citing *Saffold*, a recent federal district court decision has permitted tolling during a 15-month gap between the inmate's original and successive state habeas petition. *Romero v. Roe*, 130 F.Supp.2d 1148, 1149-1151 (C.D. Cal. 2001). *Saffold*'s expansion of tolling to include such lengthy dilatory behavior has resulted in a circuit conflict between the Ninth Circuit and the Fifth, Seventh and Tenth Circuits over the important question of whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. section 2244(d)(2), the AEDPA's tolling provision.[5]

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5. The resolution of this issue is a matter of federal law. In *Gibson v. Klinger*, the Tenth Circuit stated that:

> Although we look to state law to determine whether an application is "properly filed," we apply our own definition of "pending," which we interpreted in *Barnett* [*v. Lemaster*, 167 F.3d 1321 (10th Cir. 1999)] as a matter of federal law. *Id.*; *see also Mills v. Norris*, 187 F.3d 881, 883 (8th Cir. 1999) (holding the term "pending" is a matter

A. Certiorari Should Be Granted To Resolve The Circuit Conflict Created By *Saffold* And To Settle An Important Question Of Federal Law

The majority opinion in *Saffold* has been severely criticized by and is in direct conflict with the Seventh Circuit's opinion in *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000). Judge Easterbrook explained in *Fernandez* that:

> The ninth circuit did not explain [in *Saffold*] how time during which no collateral attack is pending in state court may be deemed time "during which a

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of federal law).

Although the interpretation of the term "pending" is a matter of federal law, our definition does require some inquiry into relevant state procedural laws: under *Barnett*'s definition of "pending," we must ask whether a petitioner was properly employing "state court procedures" in attempting to exhaust state court remedies. 167 F.3d at 1323.

Gibson v. Klinger at 806.

In California, the supreme court, intermediate courts of appeal and superior courts all have original habeas corpus jurisdiction. *See*, *Nino*, 183 F.3d at 1006, fn.2. Although a superior court order denying habeas corpus relief is non-appealable, a state prisoner may file a new habeas corpus petition in the court of appeal. *Id.* If the court of appeal denies relief, the petitioner may seek review in the California Supreme Court by way of a petition for review filed within 10 days. *Id.* at 1006, fn.3. Although petitions for review are "strongly preferred," a petitioner may instead file an original habeas petition in the California Supreme Court. *Id.* However, under California's "general rule regarding timeliness," a "habeas corpus petition must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 5 Cal.4th 813, 828, fn.7 (1993). Moreover, claims of ineffective assistance of counsel "should be filed in conjunction with the direct appeal" as a verified petition for habeas corpus. *Id.*, citing *People v. Pope*, 23 Cal.3d 412, 426-427, fn. 17 (1979).

> properly filed application for State . . . collateral review . . . is pending"; *Saffold* does not analyze the language of § 2244(d)(2) . . . . All the majority said for itself is that *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), supported its conclusion. But *Nino* presents a different issue: is time following an appellate court's decision, and preceding a timely application for discretionary review, excluded from the calculation under § 2244(d)(2)? *Nino*'s affirmative answer, with which we agree [citations omitted], does not establish that an untimely request receives the same treatment. It is sensible to say that a petition continues to be "pending" during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was "pending" in the interim. Under the majority's approach in *Saffold*, if a prisoner let ten years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under § 2244(d)(2) as long as the state court denied the belated request on the merits. That implausible understanding of § 2244(d)(2) would sap the federal statute of limitations of much of its effect.
>
> *Saffold*'s approach also would give § 2244(d)(2) a Cheshire-cat like quality, both there and not there at the same time. . . . *Saffold* implements a make-believe approach, under which petitions were *continuously* pending whenever a state court allows an untimely filing. We prefer reality. An untimely petition is just that; it is filed when it is filed, and it was not "pending" long before its filing. We decline to follow *Saffold*. (Because this decision creates a conflict

among the circuits, it was circulated before release to all judges in active service. See Circuit Rule 40(e). No judge requested a hearing en banc.)

227 F.3d at 980-981; *accord*, *Melancon v. Kaylo*, 2001 WL 822453 at *4 [rejecting *Saffold* and agreeing with the concern expressed by the Seventh and Tenth Circuits in *Fernandez* and *Gibson* "over the potential for indefinite tolling."].

Saffold merits review by this Court on a petition for writ of certiorari under Rule 10(a) of the United States Supreme Court Rules because *Saffold* is in direct conflict with the Seventh Circuit's *Fernandez* opinion as well as the Fifth Circuit's *Melancon* opinion and the Tenth Circuit's *Gibson* opinion. Rule 10(a) provides that among the cases which this Court will consider for review on certiorari are cases where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; [or] has decided an important federal question in a way that conflicts with a decision by a state court of last resort . . . ." Petitioner requests that this Court grant certiorari in order to resolve the conflict between the Ninth Circuit and the Fifth, Seventh and Tenth Circuits.

Saffold also merits review by this Court on a petition for writ of certiorari under Rule 10(c) of the United States Supreme Court Rules, which provides that among the cases which this Court will consider for review on certiorari are cases where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Petitioner requests that this Court grant certiorari because the determination of whether the time during which a petitioner failed to properly pursue his state collateral remedies falls within the meaning of "pending," set forth by 28 U.S.C. section 2244(d)(2), is an issue of substantial importance to the states and to prisoners filing petitions for habeas corpus relief. Uniform application of the statute of limitations cannot be reached until this Court addresses the

issue.

B. <u>Certiorari Should Be Granted To Prevent The Ninth Circuit From Diluting Congress's Power To Define The "Proper Scope of the Writ" Of Habeas Corpus</u>

In *Felker v. Turpin*, 518 U.S. 651, 662 (1996), this Court recognized that several sections of AEDPA "impose new requirements" for granting habeas corpus relief under 28 U.S.C. section 2254. *Felker* reiterated that:

> [W]e have long recognized that "the power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman*, 4 Cranch 75, 94, 2 L.Ed. 554 (1807), and we have likewise recognized that judgments about the proper scope of the writ are "normally for Congress to make." *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S.Ct. 1293, 1298, 134 L.Ed.2d 440 (1996).

518 U.S. at 664; *cf. Sumner v. Mata*, 449 U.S. 539, 548, fn. 2 (1981) [recognizing this Court's duty to ensure that the federal courts do not exceed their jurisdiction and stating that "the 1966 amendments embodied in section 2254(d) were intended by Congress as limitations on the exercise of that jurisdiction"].

The majority opinion in *Saffold* has improperly diluted Congress's power to define the proper scope of the writ of habeas corpus by interpreting AEDPA'S tolling provision, 28 U.S.C. § 2244(d)(2), in a way that is inconsistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d at 807; *Melancon v. Kaylo*, 2001 WL 822453 at *4. Consequently, Petitioner respectfully requests that this Court grant certiorari to ensure that Congress's intent is not thwarted.

CONCLUSION

The correct interpretation of "pending" for statute of limitations purposes is an issue of substantial importance to the states and to prisoners filing petitions for habeas corpus relief. *Saffold's* interpretation of AEDPA's tolling provision has effectively eviscerated AEDPA's statute of limitations and has created a circuit conflict which this Court should resolve. For the foregoing reasons, Petitioner prays the petition for writ of certiorari be granted.

Dated: August 15, 2001

Respectfully submitted,

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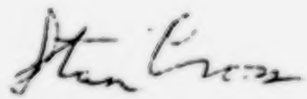

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TONY EUGENE SAFFOLD, Petitioner-Appellant,	)	No. 99-15541
	)	D.C. No.
v.	)	CV-98-01040-DFL
ANTHONY NEWLAND Respondent-Appellee.	)	**ORDER AMENDING OPINION AND DISSENT**

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
February 14, 2000--San Francisco, California

Filed July 17, 2000
Amended May 23, 2001

Before: Betty B. Fletcher, William C. Canby, Jr., and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Canby;
Dissent by Judge O'Scannlain

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that when a California Supreme Court ruling dismissing a habeas corpus petition for untimeliness at least partially addresses the merits, time should be tolled for purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA) statute of limitations.

Tony Saffold was found guilty in California state court of murder, assault with a firearm, and robbery. His conviction became final on April 20, 1992.

AEDPA imposed, for the first time, a one-year statute of limitations for state prisoners filing federal petitions for habeas corpus. For prisoners like Saffold, whose convictions had become final before passage of AEDPA, the one-year limitations period began running on AEDPA's effective date, April 24, 1996, and expired on April 23, 1997, unless it was tolled.

AEDPA's tolling provision states that the time during which a properly filed application for State post-conviction or other collateral review is pending shall not be counted toward any period of limitation.

Saffold filed his state habeas application in state superior court by delivering the petition to prison authorities on April 17, 1997 – six days before the AEDPA one-year limitation would have expired.

The court denied Saffold's state habeas petition on June 9, 1997. On June 14, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal. The Court of Appeal denied that petition on June 26. Saffold then waited four and one-half months before he filed an original habeas petition in the California Supreme Court, on November 13. The California Supreme Court denied the petition "on the merits and for lack of diligence" on May 27, 1998.

The district court, ruling that the AEDPA limitation was tolled only while each state court had the petition under consideration, excluded the four days from the superior court's denial of Saffold's petition to his petition to the state court of appeal by delivery to prison authorities, and the four and one-half months between the denial by the court of appeal and Saffold's petition to the California Supreme Court. By this calculation, Saffold's federal petition was filed nearly five months over the one-year limitation.

Saffold appealed.

[1] The district court erred in ruling that time ran for AEDPA purposes during all times when a petition was not actually under consideration in a state court. After the district court issued its order, the Ninth Circuit decided in another case how the tolling period for exhaustion of state remedies is to be determined. The Ninth Circuit held that the AEDPA statute of limitations is tolled for all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application. Applying these principles to California's post-conviction procedure, the Ninth Circuit held that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

[2] The California Supreme Court addressed the merits of Saffold's claim. The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. Tolling AEDPA's statue of limitations until the state has fully completed its review reinforces comity and respect between judicial systems.

[3] Even if giving separate consideration to the California Supreme Court's alternative ruling that Saffold's petition was denied for lack of diligence, time should have remained tolled because the dismissal for untimeliness at least partially addressed the merits. [4] The California Supreme Court's denial of Saffold's petition on the alternative ground of "lack of diligence" did not cause an interruption of the tolling period that began on June 17, 1997.

[5] Habeas corpus petitions filed under AEDPA are deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. [6] On remand, the district court would have to determine when Saffold's petition was delivered to prison authorities in order to decide whether the limitation period that expired on April 23, 1997, had already run at that time.

Judge O'Scannlain dissented, writing that the clock should have continued to run in the periods of Saffold's excessive delay between the three habeas petitions.

COUNSEL

Mary Katherine McComb, Davis, California, for the petitioner-appellant.

Stan Cross, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

ORDER

The majority opinion of this court and Judge O'Scannlain's dissent therefrom, filed on July 17, 2000, slip op. at 8271, reported at 224 F.3d 1087, are hereby amended as follows:

Majority opinion: Insert new footnote 6, to be indicated at the end of the first sentence of the last paragraph on slip op. at 8278 (ending "'Petition for writ of habeas corpus is DENIED on the merits and for lack of diligence.'"). The new footnote shall state:

> The dissent quotes selectively from these words, *infra.* The fact remains, however, that the California Supreme Court denied Saffold's petition both "*on the merits* and for lack of diligence."

Majority opinion: Insert new footnote 8, to be indicated at the end of the first sentence of the first full paragraph on slip op. at 8280 (ending " . . . June 17, 1997"). The new footnote shall state:

> The dissenting opinion, in its footnote 1, refers to the rule adopted in *Artuz v. Bennett*, 199 F.3d 116 (2d Cir. 1999), *aff'd*, 121 S. Ct. 361 (2000), that "a state-court petition is 'pending' from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures." *Id.* at 120. We have no quarrel with this formulation, but disagree with the dissent that review was "unavailable" to Saffold at the time he filed his original habeas petition in the California Supreme Court. The California Supreme Court, in denying that petition, ruled on its merits. In light of that fact, it is impossible for us to conclude that review was "unavailable" in that court. Moreover, the alternative

> ruling denying the petition for lack of diligence was "'a condition for obtaining relief,'" necessarily ruled upon by the court, not a "'condition to filing.'" *Dictado v. Ducharme*, _____ F.3d _____, _____, 2001 WL 203252 at *3 (9th Cir. Mar. 28, 2001) (quoting *Artuz v. Bennett*, 121 S. Ct. 361, 365 (2000)). Such procedural bars to the obtaining of relief do not prevent a petition from being "properly filed," *see id.*, and review from therefore being "available" even if unsuccessful.

The remaining footnotes in the majority opinion shall be renumbered accordingly.

Dissenting opinion: The dissenting opinion is amended by deleting the previous dissenting opinion and substituting in full the attached amended dissenting opinion.

With these amendments, Judges B. Fletcher and Canby have voted to deny the petition for panel rehearing, and have recommended denial of en banc rehearing. Judge O'Scannlain has voted to grant panel rehearing and en banc rehearing.

The petition for rehearing en banc and the above amendments have been circulated to the full court. An active judge requested a vote on the petition for rehearing en banc. A vote was taken and the petition failed to receive the affirmative vote of a majority of the active judges of the court. The petition for panel rehearing and for en banc rehearing is DENIED.

OPINION

CANBY, Circuit Judge:

Tony Eugene Saffold is a state prisoner appealing the

district court's dismissal of his federal petition for habeas corpus. The district court concluded that Saffold had failed to satisfy the one-year statute of limitations for a state prisoner filing a federal habeas petition. *See* 28 U.S.C. § 2244(d)(1). Whether or not Saffold's petition is barred by the statute of limitations turns in part on a calculation of the period during which the federal statute was tolled while Saffold's petitions for state habeas relief were "pending" in the California courts. *See* 28 U.S.C. § 2244(d)(2). After the district court issued its order, we decided in another case how the tolling period for exhaustion of state remedies is to be determined. *See Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). We now apply *Nino* and conclude that the district court erred by failing to toll the federal statute of limitations for the entire period during which Saffold pursued state habeas relief.

We also conclude that the "mailbox" rule for pro se prisoners applies to Saffold's petitions to the California court and the federal court for purposes of calculating tolling time under AEDPA. Whether and when Saffold delivered his petitions to prison authorities is unresolved. We therefore reverse the judgment of the district court and remand for further proceedings.

THE STATUTE OF LIMITATIONS

In 1990, Saffold was found guilty in California state court of murder, assault with a firearm, and two counts of robbery. He appealed, and his conviction became final on direct review on April 20, 1992.

Effective April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). AEDPA imposed, for the first time, a one-year statute of limitations for state prisoners

filing federal petitions for habeas corpus. For prisoners like Saffold, whose convictions had become final before passage of AEDPA, the one-year limitations period began running on AEDPA's effective date, April 24, 1996, and expired on April 23, 1997, unless it was tolled. *See Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999).[1]

AEDPA's tolling provision states that "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation." 28 U.S.C. § 2244(d)(2).

Saffold contends that he got in under the wire by filing his state habeas application in the Superior Court of San Joaquin County by delivering the petition to prison authorities on April 17, 1997--just six days before the AEDPA one-year limitation would have expired. The district court accepted that contention for purposes of decision and, in order to review the district court's ruling, we accept it as well.

The issue for our decision is how much of the time after April 17, 1997, was tolled for purposes of AEDPA.[2] We conclude that Saffold had a state collateral proceeding "pending" within the meaning of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), during the entire period from the time he filed his state petition in the trial court until the California Supreme

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1. We concluded that AEDPA's statute of limitations could not commence running before the effective date of AEDPA, lest prisoners find themselves to be already barred by a limitation on the date it was enacted. *See Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1286-87 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1377 (1999).

2. We review de novo the district court's dismissal of Saffold's petition on the ground that he has failed to satisfy the statute of limitations. *Miles*, 187 F.3d at 1105.

Court denied his habeas petition.

The Superior Court denied Saffold's state habeas petition on June 9, 1997. Five days thereafter, on June 14, 1997, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal. The Court of Appeal denied that petition on June 26, 1997. Saffold then waited four and one-half months before filing an original habeas petition in the California Supreme Court, on November 13, 1997.[3] The California Supreme Court denied the petition "on the merits and for lack of diligence" on May 27, 1998.

The district court ruled that the AEDPA limitation was tolled only while each state court had the petition under consideration. Thus, it excluded the gap of four days from the Superior Court's denial of Saffold's petition to his filing of a petition with the state Court of Appeal by delivery to prison authorities. It also excluded the four and one-half months between the denial by the Court of Appeal and Saffold's filing of his petition with the California Supreme Court.[4] By this calculation, Saffold had run over his one-year limitation by nearly five months when he filed his federal petition.

[1] We know now that the district court erred in ruling that time ran for AEDPA purposes during all times when a petition was not actually under consideration in a state court. After the

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3. Saffold contends that he did not receive notice of the denial by the Court of Appeal until November 10, 1997.

4. There are two methods by which a petitioner may seek review by the California Supreme Court after a habeas petition is denied by the Court of Appeal. The preferred method is by a petition for review, but the petitioner is also free to file instead an original petition in the California Supreme Court. *See Nino*, 183 F.3d at 1006 n.3. Saffold filed an original petition. He therefore was not governed by California's Rule of Court 28(b), upon which the dissent relies, that requires a petition for review to be filed within ten days after the Court of Appeal's decision became final.

district court issued its order, we decided *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). There we held that:

> the AEDPA statute of limitations is tolled for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application."
>
> Applying these principles to California's post-conviction procedure, we hold that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

Id. at 1006 (footnote and citation omitted) (emphasis added). It seems clear, therefore, that time should have continued to be tolled during the brief gap of a few days between the Superior Court's denial of Saffold's habeas petition and his filing of a petition in the Court of Appeal. It is less clear under *Nino*, however, whether limitations should be tolled during the four and one-half months after the Court of Appeal denied relief and before Saffold petitioned the California Supreme Court. Section 2244(d)(2) tolls the AEDPA limitation while a "properly filed" application for habeas is pending in state court. 28 U.S.C. § 2244(d)(2). *Nino* stated, as we have emphasized above, that time was tolled while a petitioner was attempting to exhaust state collateral remedies "'through proper use of state court procedures.'" *Nino*, 183 F.3d at 1006. We then added a footnote to Nino, stating:

> Because it is not at issue in this case, we express no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because

> the petitioner engaged in substantial delay in asserting habeas claims.

Id. at 1006 n.4.[5]

[2] The California Supreme Court's order denying Saffold relief stated, in its entirety: "Petition for writ of habeas corpus is DENIED on the merits and for lack of diligence."[6] The State contends that this order raises the question that *Nino* left open, but we conclude that the order does not. First and most important, the California Supreme Court did address the merits of Saffold's claim. The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. As we observed in *Nino* , "[t]olling AEDPA's statute of limitations until the state has fully completed its review reinforces comity and respect between our respective judicial systems." *Id.* at 1007. We therefore decline to adopt a rule that would require Saffold to have filed his federal petition before the California Supreme Court ruled on the merits of his claim.

[3] Even if we give separate consideration to the California Supreme Court's alternative ruling that Saffold's petition was denied "for lack of diligence," we conclude that time should remain tolled because the dismissal for untimeliness at least partially addressed the merits. The order wholly fails to specify, either by additional explanation or citation to authority, whether the delay to which it refers is the four and one-half months from the decision of the Court of

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5. We note that the Supreme Court has granted certiorari in a case that may address this issue left open in *Nino*. *See Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999), *cert. granted*, No. 99-1238, 2000 WL 122154 (U.S. Apr. 17, 2000).

6. The dissent quotes selectively from these words, *infra*. The fact remains, however, that the California Supreme Court denied Saffold's petition both "*on the merits* and for lack of diligence.

Appeal to the filing of Saffold's petition in the California Supreme Court, or the five years from the finality of Saffold's conviction to his first habeas petition.[7] But, in either event, at the time when it denied Saffold's petition partly for "lack of diligence," the California Supreme Court applied its untimeliness bar only after considering to some degree the underlying federal constitutional questions raised. *See La Crosse v. Kernan*, No. 97-55085, 2000 WL 432414, at *3-4 (9th Cir. Apr. 24, 2000). Accordingly, such an untimeliness ruling did not constitute an independent state ground of decision. *See id.* at *4. We fail to see why an untimeliness ruling entangled with the federal constitutional merits, which is insufficient to cause a default of a federal claim, should be sufficient to defeat tolling of the AEDPA limitation. The untimeliness ruling involves consideration of the federal constitutional claims. As we have already stated, we are reluctant to require the filing of a federal petition before the California Supreme Court has finished its consideration of the merits of the claims. That reluctance continues whether the California Supreme Court is considering the merits directly, or derivatively in the course of determining whether an untimeliness bar should apply.

[4] We conclude, therefore, that the California Supreme Court's denial of Saffold's petition on the alternative ground of "lack of diligence" did not cause an interruption of the tolling period that began on June 17, 1997.[8] Pursuant to *Nino*, Saffold

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7. We note that at the time Saffold's conviction became final, the California Supreme Court's standards for timeliness for filing petitions for habeas corpus petitions were not consistently applied. *See Morales v. Calderon*, 85 F.3d 1387, 1390-93 (9th Cir. 1996).

8. The dissenting opinion, in its footnote 1, refers to the rule adopted in *Artuz v. Bennett*, 199 F.3d 116 (2d Cir. 1999), *aff'd*, 121 S. Ct. 361 (2000), that "a state-court petition is 'pending' from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures." *Id.* at 120. We have no quarrel with this formulation, but disagree with the dissent that review was "unavailable"

is entitled to exclude from the calculation of the one-year limitation the entire period from the filing of his first state habeas petition in Superior Court until the denial of his habeas petition by the California Supreme Court on May 27, 1998.[9]

THE "MAILBOX" RULE

[5] We reverse, therefore, the judgment of the district court that failed to credit Saffold with this entire time of tolling. We cannot direct the district court to entertain Saffold's petition, however, because there remain other matters in dispute concerning its timeliness. In *Houston v. Lack*, 487 U.S. 266, 276 (1988), the Supreme Court held that a notice of appeal by a pro se prisoner is deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. We have said that the same rule would appear to apply to habeas corpus petitions filed under AEDPA. *See Miles v. Prunty*, 187 F.3d 1104, 1106 n.2 (9th Cir. 1999) (canvassing cases of other circuits so holding). We now hold that it does, and apply the *Houston* "mailbox" rule not only to the filing of Saffold's federal petition but also, for purposes of calculating the AEDPA

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to Saffold at the time he filed his original habeas petition in the California Supreme Court. The California Supreme Court, in denying that petition, ruled on its merits. In light of that fact, it is impossible for us to conclude that review was "unavailable" in that court. Moreover, the alternative ruling denying the petition for lack of diligence was "'a condition for obtaining relief,'" necessarily ruled upon by the court, not a "'condition to filing.'" *Dictado v. Ducharme*, ____ F.3d ____, ____, 2001 WL 203252 at *3 (9th Cir. Mar. 28, 2001) (quoting *Artuz v. Bennett*, 121 S. Ct. 361, 365 (2000)). Such procedural bars to the obtaining of relief do not prevent a petition from being "properly filed," *see id.*, and review from therefore being "available" even if unsuccessful.

9. Our conclusion that Saffold is entitled to tolling for this entire period makes it unnecessary for us to address his argument that he is entitled to equitable tolling because of the delay in notifying him of the decision of the California Court of Appeal.

limitation period, to the filing of Saffold's petition to state court that began the period of tolling. At both times, the conditions that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court. *See Houston v. Lack*, 487 U.S. 270-72.

[6] The district court assumed, as we have, without deciding, that Saffold delivered his first state petition to prison authorities for mailing on April 17, 1997. The State disputes that point and, because the initial petition was not stamped "filed" in Superior Court until May 1, 1997, it will be necessary for the district court to determine when Saffold's petition was delivered to prison authorities in order to decide whether the limitation period that expired on April 23, 1997, had already run at that time. If Saffold delivered the petition to prison authorities on or before April 23, 1997, it will still be crucial to ascertain exactly when he did so, in order to determine the number of days Saffold had remaining in his one-year limitation period. The number of days remaining may turn out to be less than the number of days between the denial of Saffold's habeas petition by the California Supreme Court on May 27, 1998, and the date Saffold filed his petition in federal court. If so, Saffold's petition would be untimely. To determine this latter issue, the district court may have to address Saffold's contention that he delivered his federal petition, which was filed on June 4, 1998, to prison officials on June 2, 1998. We leave these matters to the district court on remand.

REVERSED and REMANDED.

O'SCANNLAIN, Circuit Judge, dissenting:

Because I disagree with the majority's interpretation of *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), I must respectfully dissent from its application of the federal statute of limitations to state habeas relief and the court's judgment that the district court erred in denying the federal petition.

I

Even if we assume that the majority's newly announced adoption of the "mailbox" rule is appropriate, many additional difficulties persist in its interpretation of *Nino*. Saffold contends, and the majority agrees, that the statute of limitations should be deemed tolled for the entire process of state collateral challenge. I cannot agree. In a case involving such dilatory behavior as this, the tripartite process cannot be treated as one solid block of tolled time; rather, the clock must continue to run in the periods of excessive delay between the three separate habeas petitions.

In *Nino*, this court held that "the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge." *Id.* at 1006. While at a superficial level, this statement may appear to lend support to the majority's argument that the interstitial periods between Saffold's state petitions are irrelevant, a more careful analysis of that precedent exposes the flaws in the majority's interpretation.

After setting out that general pronouncement, the court in *Nino* was careful to mention that "it express[ed] no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* at 1006 n.4. When Saffold waited

four months from the date that his petition to the California Court of Appeal was denied until the date that he handed his California Supreme Court petition to prison officials, he was not "properly pursuing" his appeal. Indeed, the California Supreme Court's dismissal "for lack of diligence" is just the sort of thing that the panel in *Nino* was exempting when it declined to toll "substantial delay[s] in asserting habeas claims."[1/]

Unlike the petitioner in *Nino*, who pursued his state claims diligently through all three avenues of potential relief, Saffold left a glaring gap between two of his collateral appeals. The language of *Nino* expressly contemplated the possibility that the clock could run during periods in which the petitioner was "not properly pursuing his state post-conviction remedies." 183 F.3d at 1006 n.4. *Nino* exempts from its holding instances in which "the California state courts have dismissed a state habeas

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1. My reading of *Nino* is consistent with the approach taken to the 28 U.S.C. § 2244(d)(2) "pending" requirement by the Second Circuit in *Artuz v. Bennett*, 199 F.3d 116 (2d Cir. 1999). In *Bennett*, the Second Circuit held that "a state-court petition is 'pending' from the time it is first filed until finally disposed *of and further appellate review is unavailable under the particular state's procedures." Bennett*, 199 F.3d at 120 (emphasis added), *aff'd on other grounds, Artuz v. Bennett*, 121 S.Ct. 361 (2000). In this case, review by the California Supreme Court of Saffold's petition was unavailable due to, as the California Supreme Court itself said, Saffold's "lack of diligence" in pursuing that review. Thus, Saffold's petition was not "pending" under § 2244(d)(2) while he waited for several months to decide whether to seek California Supreme Court review.

It is utterly irrelevant that, as the majority notes in footnote 8, Saffold's procedural default was with regard to a "condition for obtaining relief" rather than with regard to a "condition to filing." The fact that the procedural bar was not with regard to a "condition to filing" simply means that Saffold's petition was "properly filed" under § 2244(d)(2). *Artuz v. Bennett*, 121 S.Ct. 361, 365 (2000). By contrast, the question before us in this case, unlike the question before either the Supreme Court in *Bennett*, or this court in *Dictado v. Ducharme*, ____ F.3d ____, ____ 2001 WL 293252 (9th Cir. Mar. 28, 2001), is whether Saffold's petition was "pending" under § 2244(d)(2), not whether it was "properly filed."

petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* Under the California court rule governing the "strongly preferred" method of appeal, *id.* at 1006 n.3, Saffold had ten days in which to file his petition for review to the California Supreme Court after the Court of Appeal's decision became final. Cal. Rules of Court, rule 28(b). He waited several months; and when he did eventually file his petition, it was dismissed "for lack of diligence." Under any method of review, Saffold's delay falls substantially outside the period that Nino tolls for "properly pursu[ed]" state post-conviction remedies. 183 F.3d 1006. The majority ignores the California Supreme Court's dismissal, stating that it should have justified its decision by providing "additional explanation or citation to authority." Maj. Op. at 6523. I cannot participate in the majority's attempt to tell the California Supreme Court how to deal with dilatory petitions. Saffold had obviously dallied months longer than the time allotted under California rules. Regrettably, the majority presumptuously and inappropriately purports to trump the procedural rules of the highest court of a sovereign state. By overlooking Saffold's delay in this case, the majority eviscerates the language in the fourth footnote of the *Nino* decision. What, if not a case such as this, pray tell, would satisfy the majority that a petitioner had violated *Nino*?

II

The magistrate judge provided specific findings and recommendations on the argument that Saffold should not be held accountable for the four-month delay because during that time he was not made aware that the California Court of Appeal had denied his claim. There was "no state created impediment" to prevent Saffold from having filed his petitions to the California Supreme Court and to the United States District Court in a timely fashion, regardless of the California Court of Appeal's ruling. Furthermore, neither the prison nor the

California Court of Appeal did anything to prevent Saffold from receiving notice of the decision.

There simply is no authority for the proposition that Saffold is entitled to relief for not receiving prompt notice of the denials by the various California state courts. Saffold surely could have inquired about the status of his petition once during those four months. He knew that he could ascertain the status of his petition by contacting the court, as he had done so before,[2] and by choosing to wait so long, he ran the risk of seeing his one-year period evaporate.

III

Equitable tolling does not apply to Saffold because this court has applied that doctrine "only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *See, e.g., Miles* , 187 F.3d at 1107 (quoting *Calderon (Kelly)*, 163 F.3d at 541) (internal quotation marks omitted). The Supreme Court echoed this sentiment, ruling out equitable tolling for "what is at best a garden variety claim of excusable neglect." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Here, the magistrate judge properly rejected petitioner's delayed notice argument, finding no authority "for the proposition that a court document is not effective until a prisoner receives notice of it."

IV

The court in *Nino* specifically carved out an exception to the language upon which the majority rests its decision. That exception clearly dictates that Saffold's dilatory petitions fall

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2. Previously, Saffold wrote to the San Joaquin County Superior Court to determine the status of his petition even before the court had ruled on it.

outside the scope of properly pursued state post-conviction appeals. The district court properly dismissed the petition. I therefore dissent.

APPENDIX B

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The court denied Saffold's state habeas petition on June 9, 1997. On June 14, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal. The Court of Appeal denied that petition on June 26. Saffold then waited four and one-half months before he filed an original habeas petition in the California Supreme Court, on November 13. The California Supreme Court denied the petition "on the merits and for lack of diligence" on May 27, 1998.

The district court, ruling that the AEDPA limitation was tolled only while each state court had the petition under consideration, excluded the four days from the superior court's denial of Saffold's petition to his petition to the state court of appeal by delivery to prison authorities, and the four and one-half months between the denial by the court of appeal and Saffold's petition to the California Supreme Court. By this calculation, Saffold's federal petition was filed nearly five months over the one-year limitation.

Saffold appealed.

[1] The district court erred in ruling that time ran for AEDPA purposes during all times when a petition was not actually under consideration in a state court. After the district court issued its order, the Ninth Circuit decided in another case how the tolling period for exhaustion of state remedies is to be determined. The Ninth Circuit held that the AEDPA statute of limitations is tolled for all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application. Applying these principles to California's post-conviction procedure, the Ninth Circuit held that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

[2] The California Supreme Court addressed the merits of Saffold's claim. The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. Tolling AEDPA's statue of limitations until the state has fully completed its review reinforces comity and respect between judicial systems.

[3] Even if giving separate consideration to the California Supreme Court's alternative ruling that Saffold's petition was denied for lack of diligence, time should have remained tolled because the dismissal for untimeliness at least partially addressed the merits. [4] The California Supreme Court's denial of Saffold's petition on the alternative ground of "lack of diligence" did not cause an interruption of the tolling period that began on June 17, 1997.

[5] Habeas corpus petitions filed under AEDPA are deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. [6] On remand, the district court would have to determine when Saffold's petition was delivered to prison authorities in order to decide whether the limitation period that expired on April 23, 1997, had already run at that time.

Judge O'Scannlain dissented, writing that the clock should have continued to run in the periods of Saffold's excessive delay between the three habeas petitions.

COUNSEL

Mary Katherine McComb, Davis, California, for the petitioner-appellant.

Stan Cross, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

Tony Eugene Saffold is a state prisoner appealing the district court's dismissal of his federal petition for habeas corpus. The district court concluded that Saffold had failed to satisfy the one-year statute of limitations for a state prisoner filing a federal habeas petition. *See* 28 U.S.C. § 2244(d)(1). Whether or not Saffold's petition is barred by the statute of limitations turns in part on a calculation of the period during which the federal statute was tolled while Saffold's petitions for state habeas relief were "pending" in the California courts. *See* 28 U.S.C. § 2244(d)(2). After the district court issued its order, we decided in another case how the tolling period for exhaustion of state remedies is to be determined. *See Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). We now apply *Nino* and conclude that the district court erred by failing to toll the federal statute of limitations for the entire period during which Saffold pursued state habeas relief.

We also conclude that the "mailbox" rule for pro se prisoners applies to Saffold's petitions to the California court and the federal court for purposes of calculating tolling time under AEDPA. Whether and when Saffold delivered his petitions to prison authorities is unresolved. We therefore reverse the judgment of the district court and remand for further proceedings.

THE STATUTE OF LIMITATIONS

In 1990, Saffold was found guilty in California state court of murder, assault with a firearm, and two counts of robbery. He appealed, and his conviction became final on direct review on April 20, 1992.

Effective April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). AEDPA imposed, for the first time, a one-year statute of limitations for state prisoners filing federal petitions for habeas corpus. For prisoners like Saffold, whose convictions had become final before passage of AEDPA, the one-year limitations period began running on AEDPA's effective date, April 24, 1996, and expired on April 23, 1997, unless it was tolled. *See Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999).[1]

AEDPA's tolling provision states that "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation." 28 U.S.C. § 2244(d)(2).

Saffold contends that he got in under the wire by filing his state habeas application in the Superior Court of San Joaquin County by delivering the petition to prison authorities on April 17, 1997--just six days before the AEDPA one-year limitation would have expired. The district court accepted that contention for purposes of decision and, in order to review the district court's ruling, we accept it as well.

The issue for our decision is how much of the time after April 17, 1997, was tolled for purposes of AEDPA.[2] We

1. We concluded that AEDPA's statute of limitations could not commence running before the effective date of AEDPA, lest prisoners find themselves to be already barred by a limitation on the date it was enacted. *See Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1286-87 (9th Cir. 1997), *overruled on other grounds* by *Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1377 (1999).

2. We review de novo the district court's dismissal of Saffold's petition on the ground that he has failed to satisfy the statute of limitations. *Miles*, 187 F.3d at 1105.

conclude that Saffold had a state collateral proceeding"pending" within the meaning of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), during the entire period from the time he filed his state petition in the trial court until the California Supreme Court denied his habeas petition.

The Superior Court denied Saffold's state habeas petition on June 9, 1997. Five days thereafter, on June 14, 1997, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal. The Court of Appeal denied that petition on June 26, 1997. Saffold then waited four and one-half months before filing an original habeas petition in the California Supreme Court, on November 13, 1997.[3] The California Supreme Court denied the petition "on the merits and for lack of diligence" on May 27, 1998.

The district court ruled that the AEDPA limitation was tolled only while each state court had the petition under consideration. Thus, it excluded the gap of four days from the Superior Court's denial of Saffold's petition to his filing of a petition with the state Court of Appeal by delivery to prison authorities. It also excluded the four and one-half months between the denial by the Court of Appeal and Saffold's filing of his petition with the California Supreme Court.[4] By this calculation, Saffold had run over his one-year limitation by nearly five months when he filed his federal petition.

3. Saffold contends that he did not receive notice of the denial by the Court of Appeal until November 10, 1997.

4. There are two methods by which a petitioner may seek review by the California Supreme Court after a habeas petition is denied by the Court of Appeal. The preferred method is by a petition for review, but the petitioner is also free to file instead an original petition in the California Supreme Court. *See Nino*, 183 F.3d at 1006 n.3. Saffold filed an original petition. He therefore was not governed by California's Rule of Court 28(b), upon which the dissent relies, that requires a petition for review to be filed within ten days after the Court of Appeal's decision became final.

[1] We know now that the district court erred in ruling that time ran for AEDPA purposes during all times when a petition was not actually under consideration in a state court. After the district court issued its order, we decided *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). There we held that:

> the AEDPA statute of limitations is tolled for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application."
>
> Applying these principles to California's post-conviction procedure, we hold that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

Id. at 1006 (footnote and citation omitted) (emphasis added). It seems clear, therefore, that time should have continued to be tolled during the brief gap of a few days between the Superior Court's denial of Saffold's habeas petition and his filing of a petition in the Court of Appeal. It is less clear under *Nino*, however, whether limitations should be tolled during the four and one-half months after the Court of Appeal denied relief and before Saffold petitioned the California Supreme Court. Section 2244(d)(2) tolls the AEDPA limitation while a "properly filed" application for habeas is pending in state court. 28 U.S.C. § 2244(d)(2). *Nino* stated, as we have emphasized above, that time was tolled while a petitioner was attempting to exhaust state collateral remedies "'through proper use of state court procedures.'" *Nino*, 183 F.3d at 1006. We then added a footnote to Nino, stating:

> Because it is not at issue in this case, we express no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims.

Id. at 1006 n.4.[5]

[2] The California Supreme Court's order denying Saffold relief stated, in its entirety: "Petition for writ of habeas corpus is DENIED on the merits and for lack of diligence." The State contends that this order raises the question that *Nino* left open, but we conclude that the order does not. First and most important, the California Supreme Court did address the merits of Saffold's claim. The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. As we observed in Nino , "[t]olling AEDPA's statute of limitations until the state has fully completed its review reinforces comity and respect between our respective judicial systems." *Id.* at 1007. We therefore decline to adopt a rule that would require Saffold to have filed his federal petition before the California Supreme Court ruled on the merits of his claim.

[3] Even if we give separate consideration to the California Supreme Court's alternative ruling that Saffold's petition was denied "for lack of diligence," we conclude that time should remain tolled because the dismissal for untimeliness at least partially addressed the merits. The order wholly fails to specify, either by additional explanation or citation to authority, whether the delay to which it refers is the four and one-half months from the decision of the Court of

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5. We note that the Supreme Court has granted certiorari in a case that may address this issue left open in *Nino*. *See Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999), *cert. granted*, No. 99-1238, 2000 WL 122154 (U.S. Apr. 17, 2000).

Appeal to the filing of Saffold's petition in the California Supreme Court, or the five years from the finality of Saffold's conviction to his first habeas petition.[6] But, in either event, at the time when it denied Saffold's petition partly for "lack of diligence," the California Supreme Court applied its untimeliness bar only after considering to some degree the underlying federal constitutional questions raised. *See La Crosse v. Kernan*, No. 97-55085, 2000 WL 432414, at *3-4 (9th Cir. Apr. 24, 2000). Accordingly, such an untimeliness ruling did not constitute an independent state ground of decision. *See id.* at *4. We fail to see why an untimeliness ruling entangled with the federal constitutional merits, which is insufficient to cause a default of a federal claim, should be sufficient to defeat tolling of the AEDPA limitation. The untimeliness ruling involves consideration of the federal constitutional claims. As we have already stated, we are reluctant to require the filing of a federal petition before the California Supreme Court has finished its consideration of the merits of the claims. That reluctance continues whether the California Supreme Court is considering the merits directly, or derivatively in the course of determining whether an untimeliness bar should apply.

[4] We conclude, therefore, that the California Supreme Court's denial of Saffold's petition on the alternative ground of "lack of diligence" did not cause an interruption of the tolling period that began on June 17, 1997. Pursuant to *Nino*, Saffold is entitled to exclude from the calculation of the one-year limitation the entire period from the filing of his first state habeas petition in Superior Court until the denial of his habeas petition by the California Supreme Court on May 27, 1998.[7]

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6. We note that at the time Saffold's conviction became final, the California Supreme Court's standards for timeliness for filing petitions for habeas corpus petitions were not consistently applied. *See Morales v. Calderon*, 85 F.3d 1387, 1390-93 (9th Cir. 1996).

7. Our conclusion that Saffold is entitled to tolling for this entire period makes it unnecessary for us to address his argument that he is entitled to equitable tolling because of the delay in notifying him of the decision of the California Court of Appeal.

THE "MAILBOX" RULE

[5] We reverse, therefore, the judgment of the district court that failed to credit Saffold with this entire time of tolling. We cannot direct the district court to entertain Saffold's petition, however, because there remain other matters in dispute concerning its timeliness. In *Houston v. Lack*, 487 U.S. 266, 276 (1988), the Supreme Court held that a notice of appeal by a pro se prisoner is deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. We have said that the same rule would appear to apply to habeas corpus petitions filed under AEDPA. *See Miles v. Prunty*, 187 F.3d 1104, 1106 n.2 (9th Cir. 1999) (canvassing cases of other circuits so holding). We now hold that it does, and apply the *Houston* "mailbox" rule not only to the filing of Saffold's federal petition but also, for purposes of calculating the AEDPA limitation period, to the filing of Saffold's petition to state court that began the period of tolling. At both times, the conditions that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court. *See Houston v. Lack*, 487 U.S. 270-72.

[6] The district court assumed, as we have, without deciding, that Saffold delivered his first state petition to prison authorities for mailing on April 17, 1997. The State disputes that point and, because the initial petition was not stamped "filed" in Superior Court until May 1, 1997, it will be necessary for the district court to determine when Saffold's petition was delivered to prison authorities in order to decide whether the limitation period that expired on April 23, 1997, had already run

at that time. If Saffold delivered the petition to prison authorities on or before April 23, 1997, it will still be crucial to ascertain exactly when he did so, in order to determine the number of days Saffold had remaining in his one-year limitation period. The number of days remaining may turn out to be less than the number of days between the denial of Saffold's habeas petition by the California Supreme Court on May 27, 1998, and the date Saffold filed his petition in federal court. If so, Saffold's petition would be untimely. To determine this latter issue, the district court may have to address Saffold's contention that he delivered his federal petition, which was filed on June 4, 1998, to prison officials on June 2, 1998. We leave these matters to the district court on remand.

REVERSED and REMANDED.

O'SCANNLAIN, Circuit Judge, dissenting:

Because I disagree with the majority's interpretation of *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), I must respectfully dissent from its application of the federal statute of limitations to state habeas relief and the court's judgment that the district court erred in denying the federal petition.

I

Even if we assume that the majority's newly announced adoption of the "mailbox" rule is appropriate, many additional difficulties persist in its interpretation of *Nino*. Saffold contends, and the majority agrees, that the statute of limitations should be deemed tolled for the entire process of state collateral challenge. I cannot agree. In a case involving such dilatory behavior as this, the tripartite process cannot be treated as one solid block of tolled time; rather, the clock must continue to run in the periods of excessive delay between the three separate

habeas petitions.

In *Nino*, this court held that "the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge." *Id.* at 1006. While at a superficial level, this statement may appear to lend support to the majority's argument that the interstitial periods between Saffold's state petitions are irrelevant, a more careful analysis of that precedent exposes the flaws in the majority's interpretation.

After setting out that general pronouncement, the court in *Nino* was careful to mention that "it express[ed] no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* at 1006 n.4. When Saffold waited four months from the date that his petition to the California Court of Appeal was denied until the date that he handed his California Supreme Court petition to prison officials, he was not "properly pursuing" his appeal. Indeed, the California Supreme Court's dismissal "for lack of diligence" is just the sort of thing that the panel in *Nino* was exempting when it declined to toll "substantial delay[s] in asserting habeas claims."

Unlike the petitioner in *Nino*, who pursued his state claims diligently through all three avenues of potential relief, Saffold left a glaring gap between two of his collateral appeals. The language of *Nino* expressly contemplated the possibility that the clock could run during periods in which the petitioner was "not properly pursuing his state post-conviction remedies." 183 F.3d at 1006 n.4. *Nino* exempts from its holding instances in which "the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* Under the California court rule governing the "strongly preferred" method

of appeal, id. at 1006 n.3, Saffold had ten days in which to file his petition for review to the California Supreme Court after the Court of Appeal's decision became final. Cal. Rules of Court, rule 28(b). He waited several months; and when he did eventually file his petition, it was dismissed "for lack of diligence." Under any method of review, Saffold's delay falls substantially outside the period that Nino tolls for "properly pursu[ed]" state post-conviction remedies. 183 F.3d 1006. The majority ignores the California Supreme Court's dismissal, stating that it should have justified its decision by providing "additional explanation or citation to authority." Maj. Op. at 6523. I cannot participate in the majority's attempt to tell the California Supreme Court how to deal with dilatory petitions. Saffold had obviously dallied months longer than the time allotted under California rules. Regrettably, the majority presumptuously and inappropriately purports to trump the procedural rules of the highest court of a sovereign state. By overlooking Saffold's delay in this case, the majority eviscerates the language in the fourth footnote of the *Nino* decision. What, if not a case such as this, pray tell, would satisfy the majority that a petitioner had violated *Nino*?

II

The magistrate judge provided specific findings and recommendations on the argument that Saffold should not be held accountable for the four-month delay because during that time he was not made aware that the California Court of Appeal had denied his claim. There was "no state created impediment" to prevent Saffold from having filed his petitions to the California Supreme Court and to the United States District Court in a timely fashion, regardless of the California Court of Appeal's ruling. Furthermore, neither the prison nor the California Court of Appeal did anything to prevent Saffold from receiving notice of the decision.

There simply is no authority for the proposition that Saffold is entitled to relief for not receiving prompt notice of the denials by the various California state courts. Saffold surely could have inquired about the status of his petition once during those four months. He knew that he could ascertain the status of his petition by contacting the court, as he had done so before,[1] and by choosing to wait so long, he ran the risk of seeing his one-year period evaporate.

III

Equitable tolling does not apply to Saffold because this court has applied that doctrine "only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *See, e.g., Miles* , 187 F.3d at 1107 (quoting *Calderon (Kelly)*, 163 F.3d at 541) (internal quotation marks omitted). The Supreme Court echoed this sentiment, ruling out equitable tolling for "what is at best a garden variety claim of excusable neglect." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Here, the magistrate judge properly rejected petitioner's delayed notice argument, finding no authority "for the proposition that a court document is not effective until a prisoner receives notice of it."

IV

The court in *Nino* specifically carved out an exception to the language upon which the majority rests its decision. That exception clearly dictates that Saffold's dilatory petitions fall outside the scope of properly pursued state post-conviction appeals. The district court properly dismissed the petition. I therefore dissent.

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1. Previously, Saffold wrote to the San Joaquin County Superior Court to determine the status of his petition even before the court had ruled on it.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY EUGENE SAFFOLD,	)	
	)	No. 99-15541
Petitioner-Appellant,	)	DC No. CV-98-01040
	)	DFL
v.	)	
	)	
ANTHONY NEWLAND,	)	**ORDER**
	)	
Respondent-Appellee.	)	FILED: June 4, 2001
_____	)	

CANBY, Circuit Judge

The motion of the respondent-appellee for a stay of mandate is GRANTED. The mandate of this court is stayed for 90 days from May 23, 2001, the date of denial of the respondent's petition for panel and en banc rehearing. If, within that time, a petition for certiorari is filed with the Clerk of the Supreme Court of the United States, then the mandate shall be further stayed until final disposition of the petition by the Supreme Court.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,

Petitioner,

No. CIV S-98-1040 DFL JFM P

vs.

ANTHONY NEWLAND,

Respondent.

ORDER

FILED: Feb. 25, 1999

/

Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's January 6, 1999 order which granted respondent's August 28, 1998 motion to dismiss. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must "indicate which specific issue or issues satisfy" the requirement. 28 U.S.C. § 2253(c)(3).

Petitioner has made a substantial showing of the denial of a constitutional right in the following issues presented in the instant petition: whether petitioner's application is barred by the statute of limitations contained in 28 U.S.C. § 2244(d)(1).

Accordingly, IT IS HEREBY ORDERED that a certificate of appealability is issued in the present action.

DATED: February 24, 1999.

s/ David F. Levi
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,

Petitioner,

vs.

No. CIV S-98-1040
DFL JFM P

ANTHONY NEWLAND,

Respondent.

ORDER

FILED: Jan. 6, 1999

Petitioner, a state prisoner, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On November 3, 1998, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed November 3, 1998, are adopted in full;

2. Respondent's August 28, 1998 motion to dismiss is granted; and

3. This action is dismissed.

DATED: January 5, 1999

s/ David F. Levi
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,

Petitioner,

vs.

ANTHONY NEWLAND,

Respondent.

_____/

No. CIV S-98-1040
DFL JFM P

FINDINGS & RECOMMENDATIONS

FILED: Nov. 3, 1998

Petitioner, a state prisoner proceeding pro se and in forma pauperis, filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on June 4, 1998. This matter is before the court on respondent's September 21, 1998 motion to dismiss.

Respondent contends that the petition is barred by the statute of limitations and is not exhausted. Petitioner argues that the petition is timely and/or that the statute of limitations period should be equitably tolled. He concedes that his petition contains an unexhausted claim, but requests that the court dismiss that claim and proceed with the remainder of the petition.

I. Statute of Limitations

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted. The AEDPA amended 28 U.S.C. § 2244(d)(1) so that it now provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in

custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Section 2244(d)(2) provides that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. 28 U.S.C. § 2244(d). The statute of limitations was enacted on April 24, 1996, and the one year time limit began to run on that date against state prisoners whose convictions had become final on or before that date. Calderon v. U.S. Dist. Court for Central Dist. of Cal. (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997). The Ninth Circuit has held that § 2244(d) is a statute of limitations subject to equitable tolling. Id. at 1285.

II. Analysis

A. Limitations Period

For purposes of the statute of limitations analysis, the relevant chronology of this case is as follows. On April 3, 1990, petitioner was found guilty after a jury trial. On July 6,1990, petitioner filed a notice of appeal. On January 27, 1992, the California Court of Appeal filed an opinion in which it stayed part of petitioner's sentence and affirmed the judgment as modified. On March 4, 1992, petitioner filed a petition for review with the California Supreme Court. On April 15, 1992, the California Supreme Court denied the petition for review. On April 20, 1992, the California Court of Appeal certified that the January 27, 1992 opinion had become final. The statute of limitations began to run on April 24, 1996, the date of enactment of the AEDPA, since petitioner's conviction had become final before that date. Calderon, 128 F. 3d at 1286. Petitioner did not file any documents in the California courts before the statute of limitations expired on April 24, 1997.

On May 1, 1997, petitioner filed a petition for writ of habeas corpus with the San Joaquin County Superior Court. This petition was denied on June 9, 1997. On June 18, 1997, petitioner filed a petition for writ of habeas corpus with the California Court of Appeal. The petition was denied on June 26, 1997. On November 13, 1997, petitioner filed a petition for writ of habeas corpus with the California Supreme Court. The petition was denied on May 27, 1998. On June 4, 1998, petitioner filed the instant application for a writ of habeas corpus.

Because petitioner's May 1, 1997, June 18, 1997, and November 13, 1997 petitions were filed after the statute of limitations had expired, they do not operate to toll the statute. Petitioner argues, however, that the application of the limitations period must be delayed because of state action which prevented him from filing a timely application and because petitioner only recently discovered the factual predicate of one of the claims presented.

B. Mailbox Rule

Petitioner contends that the statute of limitations should be equitably tolled because of the mailbox rule. See Houston v. Lack, 487 U.S. 266, 276 (a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk). He has filed two declarations in this court in which he sets forth the dates on which he gave his petitions to prison guards for filing in the California courts and in this court. The dates do not match, but neither set of dates will avoid the statute of limitations. In his declaration under penalty of perjury filed in support of the petition for writ of habeas corpus in this court, petitioner represents that he gave his petition for writ of habeas corpus to prison authorities for filing in the California Superior Court on April 17, 1997, in the California Court of Appeal on June 15, 1997, in the California Supreme Court on November 10, 1997, and in this court on June 2, 1998.

In his opposition to the instant motion, petitioner declares under penalty of perjury that he gave his petition for writ of habeas corpus to prison authorities for filing in the California Court of Appeal on June 14, 1997 and in this court on May 27, 1998. The second set of dates is somewhat suspect since the petition for writ of habeas corpus filed in this court was signed by petitioner on June 2, 1998, six days after he declared under penalty of perjury he gave it to prison authorities for mailing. Petitioner is advised that the filing of false information with this court may lead to civil and criminal sanctions. In the interest of timely resolution of this motion, however, the court will analyze the problem under both sets of dates.

Assuming *arguendo* the accuracy of the first declaration, the statute of limitations began to run against petitioner on April 24, 1996. Petitioner filed his petition for writ of habeas corpus in the California Superior Court on April 17, 1997, three hundred fifty eight days after the statute began to run. This tolled the statute of limitations. 28 U.S.C. § 2244(d)(2). The

petition was denied on June 9, 1997. The statute of limitations began to run again on June 10, 1997. At this time petitioner had seven days left to file his petition. Petitioner filed his petition with the California Court of Appeal on June 14, 1997, or four days later. He then had three days left to file his petition. The statute was tolled until the petition was denied on June 26, 1997. The statute began to run again on June 27, 1997. Petitioner filed his petition with the California Supreme Court on November 10, 1997, more than four months after the statute resumed running. If these dates are accurate the petition was untimely.[1/]

Assuming *arguendo* the accuracy of the second declaration, the statute of limitations also began to run against petitioner on April 24, 1996. Petitioner filed his petition for writ of habeas corpus in the California Superior Court on April 17, 1997, three hundred fifty eight days after the statute began to run. This tolled the statute of limitations. 28 U.S.C.§ 2244(d)(2). The petition was denied on June 9, 1997. The statute of limitations began to run again on June 10, 1997. At this time petitioner had seven days left to file his petition. Petitioner filed his petition with the California Court of Appeal

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1. Petitioner contends that the Court of Appeals denied his petition on November 10, 1997, because that is when he allegedly received notice of the denial. Petitioner cites no authority for the proposition that a court document is not effective until a prisoner receives notice of it, and this court declines to so hold. Further, if petitioner wished to ascertain the status of his petition with the Court of Appeal, he could have corresponded with that court, as he did in November.

Even if the Court of Appeals had denied the petition on November 10, 1997, and petitioner had filed his petition with the California Supreme Court on that date, his petition to this court would still be untimely. The petition to the California Supreme Court was denied on May 27, 1998. The statute began to run again on May 28, 1998. Petitioner would then have had three days left to file his petition in this court. Pursuant to the "mailbox rule," petitioner filed the instant application on June 2, 1998, which is five days later, or two days too late.

on June 14, 1997, or four days later. He then had three days left to file his petition. The statute was tolled until the petition was denied on June 26, 1997. The statute began to run again on June 27, 1997. Petitioner filed his petition with the California Supreme Court on November 10, 1997, more than four months after the statute resumed running. Using these dates the petition again was untimely.

C. Improper State Action

Petitioner claims that the one year period of limitation should not have begun to run until November 10, 1997, because the state created an impediment to timely filing of his application. See 28 U.S.C. § 2244(d)(1)(B). Petitioner states that although his petition to the California Court of Appeal was denied on June 26, 1997, he was not put on notice of the denial until November 10, 1997, when he wrote to the California Court of Appeal asking for information about the status of his petition. Petitioner surmises that he failed to receive earlier notice of the denial because of "State action by either the Appellate Court's failure to notify Petitioner that the petition had been denied, or the prison's failure to issue Petitioner his legal mail." (Response at 5.) He contends that the failure to receive notification of the denial constitutes illegal state action preventing the filing of an earlier petition both in the California Supreme Court and in this court. Even assuming that petitioner did not receive notice of the denial of his petition for writ of habeas corpus to the California Court of Appeal until November 10, 1997, this would not make his petition timely. There was no state created impediment to filing his earlier applications to the California courts on April 17, 1997 and June 15, 1997. Accordingly, the statute had already started to run at the time of petitioner's receipt of the decision of the Court of Appeals. As discussed above, even if petitioner was unable to file his subsequent petition until November 10, 1997 because of some improper state action, the petition would still be untimely.

Further, the vague claim made by petitioner that someone must have prevented him from receiving notice of the decision does not constitute "unconstitutional state action." There is no evidence that either the Court of Appeal or prison authorities failed to obey the constitution in this regard. See, eg., Miller v. Marr, 141 F. 3d 976, 978 (10th Cir. 1998), cent. denied ____ S.Ct. ____, 1998 WL 407280 (U.S. Oct. 5, 1998) (not enough to say, without elaboration, that prison library lacked relevant statutes and case law or that the procedure to request specific materials was inadequate) Hullum v. Maloney, 14 F. Supp. 2d 164 (D. Mass.1998) (same). Petitioner's claim lacks merit.

D. Discovery of Factual Predicate of Claims

Petitioner claims that the one year period of limitation should not begin to run until February 1997 because he could not have discovered the factual predicate of one of his claims prior to that time. See 28 U.S.C. § 2244(d)(1)(D).[2] If petitioner is correct, then his petition would be timely.

One of petitioner's claims is that his trial counsel was ineffective because he failed to introduce preliminary hearing testimony to the effect that the victim's wife had identified two other men in a photo lineup as the possible perpetrators of her husband's murder. He argues that this evidence was necessary in order to impeach the testimony of the victim's wife.[3] (Petition at 18 - 19.) Petitioner states that it was not until his family hired a private investigator in February 1997 to poll the jurors at his trial that he discovered that this information might

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2. In another part of the opposition, petitioner alleges that the factual predicate of his 26 ineffective assistance of counsel claim was discovered on May 8, 1997. (Opposition at 12.)

3. The victim's wife also identified petitioner as the perpetrator from a photo lineup.

have influenced the verdict of several jurors. He states that, until this time, he was not aware that he could satisfy the "prejudice" prong of this particular claim.

Petitioner's claim must fail. He was aware during his trial that the victim's wife had not been impeached with the preliminary hearing testimony. He was therefore aware of the "factual predicate" of this claim at that time and could have raised it then. Although petitioner states that it was not until he received the juror statements that he was aware that counsel's omission may have actually influenced the jury, this evidence did not establish a factual predicate for his claim but only possible evidence in support thereof. Section 2244(d)(1)(D) runs from the date a petitioner is on notice of the facts which would support a claim, not from the date on which he has in his possession evidence to support his claim. See, e.g., Flanagan v. Johnson, 154 F. 3d 196, 198 (5th Cir. 1998) ("[Petitioner] is confusing his knowledge of the factual predicate of his claim with the time permitted for gathering evidence in support of that claim. . . Section 2244(d)(1)(D) does not convey a statutory right to an extended delay . . . while a habeas petitioner gathers every possible scrap of evidence that might . . . support his claim"); Youngblood v. Greiner, 1998 WL 720681 (S.D.N.Y. 1998) (receipt of evidence in support of petitioner's claim would not toll the statute where facts underlying the claim were known earlier). The court also notes that petitioner argues in his petition to this court that no showing of prejudice is required as to this claim. (See Petition at 19, 29.)

The court also concludes that petitioner has not made a showing that he exercised due diligence in obtaining the juror information. He states that he had "no way of knowing how to contact the jurors" but that his family was "finally able to hire a private investigator." Other than these excuses as to his inaction, he has made no showing of an effort to learn this information earlier. Finally, the court notes that petitioner has raised numerous other claims in his petition. There is no evidence that those claims were unknown at an earlier date.

Petitioner's claim that the statute of limitations did not begin to run until February 1997, is without merit.

Accordingly, IT IS HEREBY RECOMMENDED that respondent's August 28, 1998 motion to dismiss be granted and this case be closed.[4]

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: October 30, 1998.

s/ John F. Moulds
UNITED STATES MAGISTRATE JUDGE

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4. In light of this disposition, the court need not rule on respondent's claim that the petition is not exhausted or on petitioner's request that the court proceed only on the exhausted claims.

APPENDIX G

S065746

IN THE SUPREME COURT OF CALIFORNIA

IN RE TONY EUGENE SAFFOLD

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED on the merits and for lack of diligence.

FILED: May 27, 1998

s/ George
Chief Justice

Supreme Court, U.S.
FILED
SEP 17 2001

No. 01-301 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

ANTHONY NEWLAND, Petitioner,

v.

TONY EUGENE SAFFOLD, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Mary Katherine McComb
Counsel of Record
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Tony Eugene Saffold

20 pp

QUESTION PRESENTED

Whether, where the rules for the timely filing of a petition for habeas corpus are not clear and the state court gives no reasons for denying a petition for lack of diligence, a federal court properly defers to a state court's decision to rule on the merits when determining whether an application for writ of habeas corpus is entitled to tolling under 28 U.S.C. § 2244(d)(2)?

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RESPONDENT'S BRIEF IN OPPOSITION

Mr. Saffold respectfully requests that this Court deny the petition for writ of certioran seeking review of the judgement of the Court of Appeal for the Ninth Circuit that reversed the District Court's order dismissing Mr. Saffold's application for writ of habeas corpus as failing to satisfy the statute of limitations for a state prisoner filing a federal habeas corpus petition.

STATEMENT OF THE CASE

Petitioner Newland's digest of the proceedings neglects to mention that at all times during his pursuit of post-conviction relief, Mr. Saffold acted conscientiously and without undue delay. After a timely appeal, Mr. Saffold's state court conviction became final on April 20, 1992. On April 24, 1996, AEDPA imposed a new statute of limitations. On April 17, 1997, before the expiration of the statute, Mr. Saffold filed a habeas application in state superior court by delivering the petition to prison authorities. This petition was denied solely on the merits on June 9, 1997. Mr. Saffold received notice that his petition had been denied on June 14, 1997, and filed his petition with the California Court of Appeals the same day by delivering it to prison officials. On June 26, 1997, the Court of Appeals denied Mr. Saffold's petition solely on the merits. Mr. Saffold was not put on notice by the Court of Appeals that habeas corpus relief had been denied until November 10, 1997. However, on the very day he received notice of the Court of Appeals' denial, Mr. Saffold filed a petition for writ of habeas corpus with the California Supreme Court by delivering it to prison officials. On May 27, 1998, the California Supreme Court denied Mr. Saffold's petition. On June 2, 1998, the same day he received notice that the California Court denied his petition, Mr. Saffold filed his application for a writ of habeas corpus in the United States District Court delivering it to prison officials. App. A at 9; App. B at 7.

REASONS THE WRIT SHOULD BE DENIED

Petitioner Newland neglects a critical fact in the introductory statement of his petition. He asserts that the California State Supreme Court dismissed Mr. Saffold's habeas corpus petition for "lack of diligence." Pet. at i. This assertion is incomplete and misleading. In fact, the California Supreme Court denied Mr. Saffold's petition *both* on the merits and for "lack of diligence." The Ninth Circuit Court of Appeal declined to dismiss Mr. Saffold's application as outside the statute of limitations set forth in 28 U.S.C. § 2244(d)(1) precisely because California's highest court addressed the petition on the merits. Noting that the whole purpose of the tolling provision of 28 U.S.C. § 2244(d)(2) was to permit state courts the opportunity to rule on the merits of a claim, the Ninth Circuit found that the entire period during which Mr. Saffold pursued state remedies was tolled. The Ninth Circuit's reasoning was right, shows a proper deference to California's procedures, and should not be disturbed. Furthermore, the reasoning in *Saffold* is critically dependent on unique aspects of California law and, as such, the claimed conflict with holdings in other circuits is illusory. Finally, because the Court of Appeal's holding turns on peculiarities of California law, and because a critical aspect of the record below is silent, *Saffold* is not the appropriate vehicle for this Court to determine meaning of AEDPA's tolling provision.

I

THE COURT OF APPEAL'S DECISION WAS CORRECT AND PROPERLY DEFERS TO STATE COURT HOLDINGS

In *Saffold*, the Court of Appeal was presented with an unusual situation. The California State Supreme Court had denied Mr. Saffold's petition both on the merits and for lack of diligence – but with no explanation for why the petitioner was dilatory. Moreover, it was apparent that there were no clear California timeliness rules to which the Court of Appeal could refer in determining for itself whether Mr. Saffold had sought post-conviction relief in a timely manner. Indeed, as the California Supreme Court has itself noted in *In re Harris*, 5 Cal.4th 818, 23 Cal.Rptr. 2d 373 (1993), the rule regarding timeliness is only that a habeas petition "be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 5 Cal.4th at 828, n.7. Under California state law, if the petition is not filed within the time within which counsel knew or should have known the basis for the claim then the petitioner must demonstrate "good cause" for the delay. *In re Stankewitz*, 40 Cal.3d 391, 397 n. 1, 220 Cal.Rptr. 382 (1985); *In Re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993). Additionally, as the Ninth Circuit has noted, California has never ". . . established what amount of delay the court would consider "substantial," nor [has it] set out criteria for determining "good cause" to excuse such delay. *Morales v. Calderon*, 85 F.3d 1387, 1390-1393 (9th Cir. 1996). Hence, "[n]o clear rule of state law prohibited petitioner from filing a state habeas corpus petition at the time he did." *Morales*, 85 F.3d at 1391.

Faced with this situation, where Mr. Saffold had violated no clear rule of California state

law, and where the California Supreme Court alluded to a potential procedural problem without explanation, while at the same time ruling on the merits, the Court of Appeal decided two things in relation to the State's claim that Mr. Saffold failed to file his application within the AEDPA's statute of limitations. First, the Ninth Circuit ruled that if Mr. Saffold was properly pursuing his post-conviction state remedies then AEDPA's statute of limitations would be tolled for the entire time that he was in state court. 28 U.S.C. § 2244(d)(2). Second, the Court of Appeal determined that because the California Supreme Court ruled on the merits of his petition, Mr. Saffold was properly pursuing state remedies. These holdings were correct.

Petitioner Newland does not dispute that the Ninth Circuit correctly ruled that if Mr. Saffold was properly pursuing his post-conviction state remedies then AEDPA's statute of limitations was tolled for the entire time that Mr. Saffold was in state court. Nor could he. In this holding, the *Saffold* court was simply following established law as articulated in *Nino v. Galaza* 183 F.3d 1003 (9th Cir. 1999), *cert denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). *Nino* held that periods between the disposition by a lower court and the filing for the next level of post-conviction relief in an appellate court is considered "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* at 1006.

The *Nino* holding is sound. The holding promotes an orderly process by facilitating complete state review before the filing of a federal petition. It does so by permitting a petitioner to use state procedures without fear that a subsequent federal petition would be barred by the statute of limitations. As the *Nino* Court pointed out, ". . . a contrary construction [of the tolling provision] would be antithetical to the entire theory of state remedy exhaustion and would

inevitably lead to the filing of protective federal habeas petitions." *Nino*, 183 F.3d at 1005. Furthermore, every single circuit that has considered the question of tolling during state post-conviction proceedings has held that a petitioner has the benefit of statutory tolling so long as he is "properly pursuing" state post-conviction procedures. *See*, *Swartz v. Meyers*, 204 F.3d 417, 420 (3rd Cir 2000); *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999); *Guenther v. Holt*, 173 F.3d 1328, 1331 (11th Cir. 1999); *Taylor v. Lee*, 186 F.3d 557, 561 (4th Cir.1999); *Mills v. Norris*, 187 F.3d 881, 884 (8th Cir.1999).

Not able to challenge the *Saffold* opinion on its significant holding, petitioner Newland argues only that Mr. Saffold was himself not "properly pursuing" state remedies. Newland cites the dissenting opinion in *Saffold* for the proposition that Mr. Saffold had "obviously dallied" with respect to filing his petition in the California Supreme Court four months after the denial in the Court of Appeals -- and in so doing violated clear state procedural rules. Petitioner claims that this shows that Mr. Saffold was not "properly pursuing" state remedies, and, as such, fell into an exception delineated in *Nino*, whereby tolling would not be permitted if the applicant "engaged in substantial delay in asserting habeas claims." Pet. at 7; App. A at 17; *Saffold*, 250 F.3d 1262, 1270 (9th Cir. 2000); App. B at 14; *Saffold*, 224 F.3d 1087, 1092 (9th Cir. 2000); see *Nino*, 183 F.3d at 1006, n. 4.

In a footnote in *Nino*, the Court of Appeal stated that it expressed no opinion about whether tolling would be permitted if the petitioner engaged in "substantial delay in asserting habeas claims," citing two state court cases, *In Re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993) and *In re Robbins*, 18 Cal.4th 770, 810, 77 Cal.Rptr. 2d 153 (1998). *Nino* 183 F.3d at 1006, n. 4. This suggests, albeit in dicta, that should the California Supreme Court find that a

petitioner has "substantially delayed" in asserting his habeas claims, then the statute will not be tolled. However, in its one-sentence denial of Mr. Saffold's petition, the California Supreme Court did *not* hold that Mr. Saffold had engaged in "substantial delay." Indeed, it stated only that Mr. Saffold showed "lack of diligence." The California Supreme Court did not cite either *Robbins* or *Clark* in its holding, as it surely would have done if it had meant to invoke the timeliness doctrine articulated in those two cases. Hence, even assuming that this dicta has the force of law, it is not even clear that this case falls within it.

Furthermore, it is simply not true that Mr. Saffold was violating clear state procedural rules, as petitioner Newland claims. As was pointed out by the *Saffold* majority: "There are two methods by which a petitioner may seek review by the California Supreme Court after a habeas petition is denied by the Court of Appeal." App. A at 9; *Saffold*, 250 F.3d at 1266 n. 4; App. B at 7; *Saffold* 224 F.3d at 1089 n. 4. The applicant may petition for review or file an original petition in the California Supreme Court. *Nino*, 183 F.3d at 1006 n. 3. A petition for review is governed by California Rule of Court 28(b) which requires a petition be filed within ten days after the Court of Appeal's decision was final. However, "Saffold filed an original petition. He therefore was not governed by California's Rule of Court 28(b), upon which the dissent relies, that requires a petition for review to be filed within ten days after the Court of Appeal's decision became final." App. A at 9; *Saffold*, 250 F.3d at 1268 n. 4; App. B at 7; *Saffold* 224 F.3d at 1089 n. 4. Therefore, Mr. Saffold violated no clear procedural deadlines when he filed his petition.

Contrary to petitioner Newland's assertion, the majority's decision to toll the time Mr. Saffold spent pursuing his post-conviction remedies was highly deferential to state court procedures. Since AEDPA's tolling provision speaks in terms of "properly filed applications for

state post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), application of the provision is necessarily grounded in and defined by considerations of state law. Federal courts must defer such considerations to the state courts. *See Nino*, 183 F.3d at 1005. "The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim." *Saffold*, 224 F.3d at 1090. When a state court resolves a petition on the merits, the limitations period should be tolled for the entire period that the petition was under consideration, including gaps between the filing of the petitions. *Id.* Any other result would force a petitioner to file a protective federal petition. The result in *Saffold* therefore "reinforces the orderly presentation of claims to the appropriate state tribunals and obviates the need for federal action...." *Nino*, 183 F.3d at 1005. Since the *Saffold* court merely reaffirmed established law that a petitioner properly pursuing state procedures should have the time spent in state court tolled, and then correctly applied that proposition under the circumstances of Mr. Saffold's case, the decision in *Saffold* is a correct statement of the law and should not be disturbed by this Court.

II

THE NINTH CIRCUIT'S RULING DOES NOT CONFLICT WITH OTHER CIRCUITS

Petitioner Newland asserts that the opinion in *Saffold* conflicts with cases from the Fifth, Seventh, and Tenth Circuits, namely *Melancon v. Kaylo* No. 00-30439, ____ F.3d ___, 2001 WL 822453 (5th Cir. Aug. 6 2000); *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2001); and *Gibson v. Klinger*, 232 F.3d 799 (10th Cir. 2000). But the state statutory schemes at issue in each of those cases differ in critical respects from that considered in *Saffold*. There is no conflict.

Gibson, *Fernandez*, and *Melancon* all considered rulings from states where state rules for filing applications for post conviction relief are clear.[3] The statutory schemes that were considered in these cases, in Oklahoma, Illinois and Louisiana respectively, all have clearly defined time periods within which an applicant must pursue additional post-conviction relief if denied at a lower level of the state court system. In all of the above cases, it is clear that *if* the applicants had filed for relief within the time allotted, then AEDPA's statute of limitations would have been tolled for the period between the denial of relief by one court and the filing for relief in the next, even if the applicant waited until the very last day of the period. *Fernandez*, 227 F.3d at 980; *Rowe v. Lemaster*, 225 F.3d 1173, 1174 (10th Cir 2000); *Melancon*, 2001 WL 822453 at * 4.

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[3]In *Gibson*, from the Tenth Circuit, the petitioner filed a petition for state post-conviction relief, which the Oklahoma district court denied. Gibson did not file within the thirty days state law permitted to appeal; instead, he filed several untimely motions for leave to appeal. *Gibson*, 232 F.3d at 802. In *Fernandez*, from the Seventh Circuit, the Appellate Court of Illinois affirmed an order denying Fernandez' petition. Under Illinois law, Fernandez had twenty-one days to file a petition for leave to appeal, but missed this deadline. *Fernandez*, 227 F.3d at 978-979. In *Melancon*, the petitioner also failed to file his petition for state post-conviction relief within the time allotted by statute. *Melancon*, 2001 WL 822453 at * 1.

Mr. Saffold's situation is different. California, as pointed out above, does not have statutory deadlines for filing for post-conviction relief and does not have uniform case-law rules regarding when a case will be considered procedurally barred. See *Morales,* 85 F.3d at 1390-1393. Additionally, although the California Supreme Court has recently attempted to clarify the timeliness rules for post-conviction petitions in capital cases, see *Clark*, 5 Cal.4th at 797, they have not done so for non-capital cases such as Mr. Saffold's. Hence, unlike in Illinois, Oklahoma and Louisiana, where a federal court can easily determine whether a petitioner has abided by state court rules, in California, there are no clear state rules to which the federal court can defer.

The majority in *Fernandez* criticizes *Saffold* because, in its view, although it makes sense that a "petition continues to be 'pending' during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation." *Fernandez*, 227 F.3d at 980. The majority complains that after denial in the Court of Appeals, Mr. Saffold did not have a petition again "pending" until he filed in the California Supreme Court. According to *Fernandez*, Mr. Saffold's requests applications were dead and only "resuscitated" once he filed in a new court. *Ibid.* The authors of *Fernandez* have failed to consider the ways in which California state procedure differs from that of Illinois. In California, Mr. Saffold could not appeal, or in any other way get direct review of, the denial of his superior court habeas corpus petition. *In re Crow*, 4 Cal.3d 613, 621 n.8, 94 Cal.Rptr. 254 (1971). Instead, the proper procedure for Mr. Saffold was to file an original petition in a Court of Appeals or in the California Supreme Court. If denied in the Court

of Appeals, in theory, Mr. Saffold could either have filed an original petition for habeas corpus or a petition for review from the denial. However, because California law requires filing of a petition for review within ten days of after the Court of Appeals case is final, California Rule of Court 28(b), and because he did not receive notification of the denial until over four months after it was entered, Mr. Saffold could only file an original petition. Because Mr. Saffold filed an original petition, there were no statutory time limitations on when he could file. By way of contrast, in Illinois, there is a clear time period within which a petitioner must continue the pursuit of state post-conviction relief. If the petitioner acts within that time period, there is no danger that AEDPA's statute of limitations will run out. This is because the period during which an Illinois petitioner for post-conviction relief has to perfect his appeal is considered "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Fernandez*, 277 F.3d at 980; see *Barnett v. Lemaster*167 F.3d at 1322-1323.

Although there is no set statutory period during which time will be tolled as a petitioner progresses through the state system, it makes sense that in California, just as in Illinois, there should be a time period whereby AEDPA's statute of limitations is tolled even though there is no petition waiting for a ruling, so that an applicant can pursue all state remedies in an orderly manner. Since in California there is no set time period, it is most in keeping with AEDPA's purposes to defer to a state court's decision to rule on the merits in determining whether a petition was "pending" while a petitioner pursued state remedies. This is exactly what the Court

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of Appeal did in *Saffold*. Hence, the *Fernandez*' criticism of *Saffold* is not well founded. Because of the differences between California and Illinois (as well Oklahoma and Louisiana), there is no conflict between the holdings from those states and that of *Saffold*.

III

THIS CASE DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL NATIONAL IMPORTANCE

Petitioner Newland argues that this Court should grant certiorari in this case because the issue of the meaning of "pending" for the purposes of the tolling provision is a matter of substantial importance. Pet. at 14. This case is not the appropriate one to resolve this issue.

Although the issue of when an application is "pending" within the meaning of 28 U.S.C. § 2244(d)(2) is a matter of federal law, *Mills v. Norris*, 187 F.3d 881, 883 (8th Cir.1999), the federal courts must look to state procedural law for guidance in determine the meaning of the word. *Gibson*, 232 F.3d at 801. In states which have time limits for the appeal of the denial of post-conviction relief, the relevant state procedures are the state law periods for appeal. *Ibid.* As pointed out above, California's post-conviction system is completely different. As such, any resolution of the issue of the meaning of "pending" that would appropriately factor in California state procedures would have little relevance to the meaning of "pending" in other states and circuits. Hence, *Saffold* is not the appropriate case for this Court to consider the issue.

Furthermore, *Saffold* is not the appropriate vehicle to determine the meaning of "pending" because there is a critical gap in the *Saffold* record. In denying Mr. Saffold's petition on the merits, the California Supreme Court did not make clear why Mr. Saffold's petition was not diligent. Petitioner Newland and the dissent in *Saffold* assume that in denying the petition for lack of diligence the California Supreme Court was referring to the four months between his application to the California Court of Appeals and his application to the California Supreme Court. Pet. at 7; App. A at 9; App. B at 10. There is no reason to believe that this is so. As

noted above, Mr. Saffold's state court conviction was final in 1992. He did not file a petition for post-conviction relief until five years later in 1997. As the majority in *Saffold* observed, it is impossible to determine whether the California Supreme Court was referring to this five year period or to the four months between Mr. Saffold's two applications. App. A at 11; App B at 9-10. If the California Supreme Court was referring to the four month period between Mr. Saffold's two applications, then there is a missing factual determination from the record. As noted, Mr. Saffold filed his application for post-conviction relief with the California Supreme Court, the very day that he got notice of the denial of relief from the California Court of Appeals. There is nothing in the record about why this delay occurred. If the delay in notice was due to the dilatory actions of prison officials upon whom Mr. Saffold had no choice but to rely, then Mr. Saffold might be entitled to equitable tolling – in which case his application would be timely. See *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). However, because the *Saffold* court resolved the case for other reasons, the record below is silent on the issue of non-statutory tolling. Although this factual lacuna is critical to the outcome of this case, rather than ask the Court of Appeal to address and resolve these issues, petitioner Newland asks this Court to do so. This Court should only take cases where an adequate factual record exists to resolve the questions. Since this case not have an adequate factual record, and since petitioner Newland has not requested the Court of Appeal to resolve these open issues, certiorari should be denied.

CONCLUSION

Because the Court of Appeal's ruling was correct, does not conflict with the law of other circuits, and does not present an issue of substantial importance, Mr. Saffold respectfully requests that this Court deny the petition.

Respectfully submitted,

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Attorney for Respondent
Tony Eugene Saffold

(3) COPY

No. 01-301

Supreme Court, U.S.
FILED
OCT 3 2001
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY NEWLAND, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-301

ANTHONY NEWLAND, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

ARGUMENT

CERTIORARI SHOULD BE GRANTED IN *SAFFOLD* TO RESOLVE THE CIRCUIT CONFLICT OVER AEDPA'S TOLLING PROVISION BY INTERPRETING THE MEANING OF "PENDING" IN A MANNER THAT IS CONSISTENT WITH CONGRESSIONAL INTENT

In his Brief in Opposition, Respondent asserts that the majority opinion in *Saffold* "properly defers to state court holdings" (Argument I), "does not conflict with other circuits" (Argument II), and "does not present an issue of substantial national importance" (Argument III). Despite Respondent's delay of over four and a half months in filing his original habeas corpus petition in the California Supreme Court, and despite that court's denial of the petition on the alternative ground of "lack of diligence," Respondent contends that the Ninth Circuit correctly held that he was properly pursuing his state collateral remedies because the California Supreme Court alternatively

ruled on the merits of his ineffective assistance of counsel claim. (Opp. at 4.) Respondent argues that the *Saffold* "majority's decision to toll the time Mr. Saffold spent pursuing his post-conviction remedies was highly deferential to state court procedures" (Opp. at 6) and that "[a]ny other result would force a petitioner to file a protective federal petition." (Opp. at 7.) Petitioner disagrees.

The majority opinion in *Saffold* disregards the California Supreme Court's alternative denial of the petition "for lack of diligence" and more importantly eviscerates the federal statute of limitations by interpreting AEDPA's tolling provision in a way that is inconsistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001). As pointed out by the Seventh Circuit in *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000), *Saffold* should have disregarded the entire four and a half months between the court of appeal decision and the filing in the state supreme court because the Ninth Circuit's holding in *Saffold* cannot be reconciled with *Harris v. Reed*, 489 U.S. 255, 264, n. 10 (1989). "*Harris* holds that when a state court invokes a rule of forfeiture under state law and resolves the merits as an alternative ground, *both* rulings must be respected when the petitioner applies to federal court." 227 F.3d at 981. In short, the *Saffold* opinion cannot be read as being deferential to the California Supreme Court decision.[1/]

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1. It should be noted that in *In re Robbins*, 18 Cal.4th 770 (1998), the California Supreme Court rejected a suggestion that it eliminate the practice of citing procedural bars as a second ground for denial when the merits are addressed. The *Robbins* court explained that the "basis and continuing import of our procedural bars are something quite different" than "a means of promoting finality by insulating our judgments from federal court review." *Id.* at 778, fn.1. The court stressed that decades before the development of federal procedural bar case law "we recognized and imposed

Under the interpretation of "pending" advocated by the Seventh Circuit in *Fernandez*, Respondent would not have been forced to file a protective federal petition. Rather, he merely needed to make a timely request for further review by the California Supreme Court in order to be granted further tolling under AEDPA. In California, he could have done so in one of two ways. First, if the court of appeal denies relief, a petitioner may seek review in the California Supreme Court by way of a petition for review filed within 10 days. *See*, *Nino v. Galaza*, 183 F.3d 1003, 1006, fn.3 (9th Cir. 1999). Second, although petitions for review are "strongly preferred," a petitioner may instead file an original habeas petition in the California Supreme Court. *Id.* However, under California's "general rule regarding timeliness," a "habeas corpus petition must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 5 Cal.4th 813, 828, fn.7 (1993); *In re Clark*, 5 Cal.4th 750, 755 (1993) [A petitioner must "demonstrate due diligence in pursuing potential claims."].[2/]

Given Respondent's failure to file a petition for review within 10 days and given his delay of over four and a

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procedural bars as a means of protecting the integrity of our own appeal and habeas corpus process" and that imposition of state "procedural bars, including the untimeliness bar, continues to advance among other institutional goals, the integrity of our appeal and habeas corpus process. *Id.*

2. Contrary to Respondent's assertion that the California Supreme Court has not clarified the timeliness rules for post-conviction petitions in non-capital cases (Opp. at 9), the Ninth Circuit has recognized that *Clark* and *Harris* sought to clarify the untimeliness bar for both capital and non-capital cases. *See, e.g. La Crosse v. Kernan*, 244 F.3d 702, 704-705 (9th Cir. 2001). Furthermore, a California Supreme Court denial citing only "lack of diligence" for denial of a petition has been found to be an application of the untimeliness bar. *Id.* at 705. Consequently, this Court should reject Respondent's argument to the contrary. (Opp. at 6.)

half months in filing an original petition in the California Supreme Court alleging ineffective assistance of counsel, there can be no doubt that Judge O'Scannlain correctly observed in his *Saffold* dissent that "[u]nder any method of review, Saffold's delay falls substantially outside the period that *Nino* tolls for 'properly pursu[ed]' state post-conviction remedies."[3] In *Fernandez*, the Seventh Circuit noted that it was not possible to characterize Saffold's choice of filing an original petition as "a continuation of the earlier petition that keeps the initial petition 'pending' for purposes of § 2244(d)(2)" because Saffold "did not ask for leave to file an untimely petition for discretionary review of the appellate decision rejecting his claim." 227 F.3d at 981. Instead, Saffold's filing of an original petition was "more like an application for leave to commence a new collateral proceeding." *Id.*

Resolution of the issue presented in this case (whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. section 2244(d)(2)) is a matter of federal law. *Gibson v. Klinger*, 232 F.3d at 806; *Mills v. Norris*, 187 F.3d 881, 883 (8th Cir. 1999); *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999). Although the federal courts may be guided by state procedural law in determining the

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3. Consequently, it is not necessary to know the specific reason for the California Supreme Court's "lack of diligence" finding, and this Court should reject Respondent's argument that *Saffold* is not an appropriate case for certiorari because of an alleged "critical gap" in the record. (Opp. at 12.) According to Respondent, this "critical gap" is due to the California Supreme Court's failure to "make clear why" his petition "was not diligent" and because the record below is allegedly "silent on the issue of non-statutory tolling." (Opp. at 13.) However, the record is not silent on the equitable tolling issue. Although the *Saffold* majority chose to dispose of the case by creating *Saffold's* infinite tolling rule rather than addressing the equitable tolling issue, Respondent's equitable tolling argument was addressed and rejected both by the district court and by Judge O'Scanlain in his dissenting opinion. Appendix A at 17-18; Appendix B at 14-15; Appendix F at 4-7.

meaning of "pending" under federal law, Petitioner submits that the determination does not depend on the nature of the state law ruling in the case or even in the final analysis on the actual state procedural rule or statute. For example, federal courts have held that AEDPA's one-year statute of limitations is not trumped by a state's more generous statute of limitations. *Tinker v. Moore*, 255 F.3d 1331, 1334-1335 (11th Cir. 2001); *Painter v. Iowa*, 247 F.3d 1255, 1256 (8th Cir. 2001) [affirming dismissal of federal petition as time barred under AEDPA's statute of limitations and rejecting argument by defendant that section 2244(d)(2) should be construed "to toll the statute of limitations during the entire three years allowed under Iowa law to apply for post-conviction relief because exhaustion of state remedies is a prerequisite for federal habeas relief and because principles of comity so demand."].

In *Tinker*, the Eleventh Circuit rejected the argument that AEDPA's statute of limitations forced the defendant to choose between exercising his right to meaningful access to the state courts under Florida's two-year limitation period and his right to petition for federal habeas relief. The *Tinker* court explained that:

> [W]e reject Tinker's "impermissible choice" argument. By virtue of statute, Tinker is provided both a state and federal forum in which to seek post-conviction relief. Despite his argument to the contrary, he need not forego his state remedy entirely in order to avail himself of the federal remedy. However, he must exercise it within one year of the date his judgment became final and do so in a manner that leaves him sufficient time to timely file his federal petition.

255 F.3d at 1334-1335.

Petitioner submits that the *Saffold* opinion is fundamentally flawed because of its misguided focus on "deference" to the California Supreme Court's decision to address the merits and because it refuses to address the fact that

resolution of the meaning of "pending" under AEDPA's statute of limitations involves a question of federal law (determining the intent of Congress) rather than the application of procedural bar case law (to determine whether federal courts should give deference to state procedural bars that may or may not be grounded on an independent and adequate state ground). As noted in *Tinker*, state prisoners, by statute, are "provided both a state and federal forum in which to seek post-conviction relief." 255 F.3d at 1334. The mere fact that a state is willing to entertain habeas corpus claims well beyond AEDPA's one-year statute of limitations (by way of its own more generous statute of limitations or by way of a state court's willingness to entertain a claim on the merits despite inordinate delay) should not be allowed to trump Congressional intent to "encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d at 807; *Melancon v. Kaylo*, 259 F.3d at 407; *see Tinker v. Moore*, 255 F.3d at 1334-1335; *Painter v. Iowa*, 247 F.3d at 1256.

For example, if the state of California decided to enact a statute of limitations which provided that state prisoners had two years within which to file an original petition in the appellate court following a superior court denial of a prior petition and another two years to file an original petition in the state supreme court following denial by the state appellate court, surely federal courts should not allow such a state statute to effectively override Congressional intent by ruling that AEDPA's one-year statute of limitations must be tolled for an additional four years out of deference to the state statute of limitations. The fact that AEDPA's federal statute of limitations might require state prisoners to raise their state claims earlier than they would be required to file under state law does not deprive them of either their state or federal remedy. If a state prisoner wishes to exercise both his state and federal remedies, he must exercise his state remedy within one year of the date his judgment became final (plus Congressionally

sanctioned tolling) and do so in a manner that leaves him sufficient time to timely file his federal petition. 255 F.3d at 1334-1335.

Saffold's interpretation of AEDPA's tolling provision has effectively eviscerated AEDPA's statute of limitations by allowing indefinite tolling as long as a state court addresses the merits. The *Fernandez* court correctly stated that "[u]nder the majority's approach in *Saffold*, if a prisoner let ten years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under § 2244(d)(2) as long as the state court denied the belated request on the merits." 227 F.3d at 980; *accord*, *Melancon v. Kaylo*, 259 F.3d at 406-407 [rejecting *Saffold* and agreeing with the concern expressed by the Seventh and Tenth Circuits in *Fernandez* and *Gibson* "over the potential for indefinite tolling."]. As explained by the court in *Romero v. Roe*, 130 F.Supp.2d 1148 (C.D. Cal. 2001), the *Saffold* decision was not based on

> temporal considerations. Rather, what made the four-month delay inconsequential was the fact that the state court decided, at least in part, the tardily-filed petition on the merits. . . . It was not the particular length of the delay that was crucial to the court's decision, but rather how the state court treated the tardily-filed petition.

130 F.Supp.2d at 1150.

The view that *Saffold* permits indefinite tolling has recently been confirmed by the Ninth Circuit in *Welch v. Newland*, No. 00-15366, ___ F.3d ___, 2001 WL 1111946 (9th Cir. Sept 24, 2001). In *Welch*, the district court dismissed a state prisoner's federal habeas petition for failing to satisfy AEDPA's one-year statute of limitations because he waited almost four and a half years after the state superior court's March 17, 1994, denial of his first state petition before he filed an original petition on different grounds in the California Supreme Court on August 22, 1998. In *Welch*, the Ninth Circuit stated that "[o]ur decision in *Saffold* turned, not on the length of the time gap between petitions, but on the fact that the

California Supreme Court had addressed Saffold's petition on the merits." *Welch v. Newland*, 2001 WL 1111946 at *2. The *Welch* court then explained that Welch's four and one-half year delay in filing did not defeat tolling under AEDPA because under the controlling authority of *Saffold* "the California Supreme Court's order denying Welch relief without comment or citation constituted a denial on the merits." *Id.* at *3.

In a concurring opinion, Judge Gould stated that he "was concerned that the application of the rule of *Saffold* here operates substantially to frustrate the intent of Congress in imposing a one-year limitations period for state prisoners filing federal petitions for habeas corpus in AEDPA." *Id.* at *4. He further stated that "*Saffold* leaves us" with the problem "that there is in effect no time limit whatsoever on state court proceedings" and that *Saffold* provides "no apparent way to resolve it." *Id.* at *4. Judge Gould then suggested that "[p]erhaps it would be desirable if the rule announced in *Saffold* were reexamined to determine if that rule should be maintained, modified, or rejected." *Id.* at *5.

Petitioner submits that the circuit conflict created by *Saffold* should be resolved by this Court granting certiorari in *Saffold*. It is unlikely that the Ninth Circuit will reexamine *Saffold* given that the Ninth Circuit has already rejected a petition for rehearing en banc in the instant case despite the fact that it was fully aware of the unanimous rejection of *Saffold* by the Seventh Circuit in *Fernandez*.[4/] Furthermore, even though the *Welch* case involves a more egregious disregard of the one-year statute of limitations, Petitioner submits that the instant case provides this Court with a more timely opportunity to clarify the meaning of "pending," thereby delineating the outside parameter of what constitutes Congressionally

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4. On September 25, 2000, nearly eight months prior to the denial of the petition for rehearing en banc in *Saffold*, Petitioner sent a written request to the Clerk of the Ninth Circuit asking that the active judges of the Ninth Circuit considering the petition for rehearing en banc be notified of the *Fernandez* decision.

sanctioned tolling as opposed to *Saffold's* infinite tolling rule. As each month passes, additional cases are added to the backlog of cases preserving the statute of limitations defense pending resolution of the *Saffold* case by this Court.

Petitioner requests that this Court consider the cogent statutory interpretation of "pending" recently set forth in *Robinson v. Ricks*, No. 00-CV-4526(JG), ___F.Supp.2d___, 2001 WL 1078356, at *8-12 (E.D.N.Y. Sept 07, 2001) and that this Court adopt the "plain meaning interpretation of 'pending'" set forth by that court. *Id.* at *12-13. In the alternative, Petitioner requests that this Court consider a bright line rule that no more than 90 days be tolled between each state court filing without a showing of improper state action that would justify further tolling. Such a rule would be consistent with this Court's 90-day time limit for filing petitions for writs of certiorari and with the California Supreme Court's outside limit of 90 days in capital cases for petitioners to receive the presumption that they have not engaged in substantial delay.

Petitioner requests that this Court grant certiorari because the correct interpretation of "pending"under 28 U.S.C. section 2244(d)(2) is an issue of substantial importance to the states and to prisoners filing petitions for habeas corpus relief. Uniform application of the statute of limitations cannot be reached until this Court provides a definition of "pending" that is consistent with Congressional intent.[5/]

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5. Given the "backdrop of widely divergent state procedural rules," and given the tendency of the Ninth Circuit and other federal courts to "stray from the principle that 'pending' means 'undecided,'" it is understandable that the federal courts to date have reached widely divergent conclusions on the meaning of "pending" under section 2244(d)(2). *Robinson v. Ricks*, 2001 WL 1078356, at *12.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Dated: October 2, 2001

Respectfully submitted,

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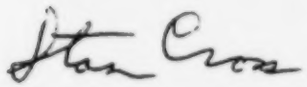

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JOINT

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SAFFOLD JOINT APPENDIX:

RELEVANT STATE COURT DOCKET ENTRIES

April 3, 1990	Saffold found guilty by jury of first degree murder, assault with a firearm and two counts of robbery in San Joaquin County Superior Court No. 40118.
July 2, 1990	San Joaquin County Superior Court sentenced Saffold to state prison for a term of 30 years to life.
July 6, 1990	Saffold filed a timely notice of appeal.
January 27, 1992	In case number C009223, the California Court of Appeal, Third Appellate District, filed an opinion in which it stayed the concurrent sentence for assault with a firearm and affirmed the judgment as modified.
March 4, 1992	Saffold timely filed a petition for review with the California Supreme Court in case number S025445.
April 15, 1992	In case number S025445, the California Supreme Court denied review of the opinion in Third Appellate District case number C009223.
April 20, 1992	The California Court of Appeal, Third Appellate District, issued a remittitur certifying that the January 27, 1992, opinion entered in case number C009223 had now become final.

May 1, 1997	The San Joaquin County Superior Court filed Saffold's petition for writ of habeas corpus in case number SC 40118A.
June 9, 1997	The San Joaquin County Superior Court denied the petition in case number SC 40118A.
June 18, 1997	The California Court of Appeal, Third Appellate District, filed Saffold's petition for writ of habeas corpus in case number C026811.
June 26, 1997	The California Court of Appeal, Third Appellate District, denied the petition in case number C026811.
November 13, 1997	The California Supreme Court filed Saffold's petition for writ of habeas corpus in case number S065746.
May 27, 1998	The California Supreme Court denied Saffold's petition for writ of habeas corpus in case number S065746.

RELEVANT DOCKET ENTRIES FOR UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA CASE NUMBER 98-CV-1040

TONY EUGENE SAFFOLD

petitioner

v.

ANTHONY NEWLAND

defendant

6/4/98	1	PETITION FOR WRIT OF HABEAS CORPUS from San Joaquin Superior Court #SC40118A; fee status request to proceed IFP, assigned to Honorable David F. Levi referred to Magistrate Judge John F. Moulds (kdc) [Entry date 06/08/98]
8/28/98	7	MOTION to dismiss by respondent Anthony Newland; and memorandum of points and authorities in support thereof (ms) [Entry date 09/10/98]
11/3/98	10	FINDINGS AND RECOMMENDATIONS by Magistrate Judge John F. Moulds RECOMMENDING that respondent's motion to dismiss [7-1] be GRANTED and this case be closed; REFERRED BACK to Honorable David F. Levi (cc: all counsel) (kdc)
1/6/99	14	ORDER by Honorable David F. Levi ORDERING CASE DISMISSED The findings and recommendations filed 11/3/98 are adopted in full; respondent's 8/28/98 motion to dismiss is granted and this action is dismissed (cc: all counsel) (gm)

1/6/99	15	JUDGMENT (cc: all counsel) (gm)
1/14/99	16	NOTICE OF APPEAL by petitioner Tony Eugene Saffold from District Court decision, (fee status due) (dbu) [Entry date 01/19/99]
2/25/99	17	ORDER by Honorable David F. Levi ORDERING certificate of appeal [16-1] GRANTED (cc: all counsel) (rb)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CASE NUMBER 99-15541

TONY EUGENE SAFFOLD

Petitioner – Appellant

v.

ANTHONY NEWLAND

Respondent – Appellee

7/17/00	FILED OPINION: REVERSED and REMANDED. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Betty B. FLETCHER; William C. CANBY, author; Diarmuid F. O'SCANNLAIN, dissenting) FILED AND ENTERED JUDGMENT. [99-15541] (rc)
7/31/00	[3960615] Filed original and 50 copies Appellee Anthony Newland petition for rehearing with suggestion for rehearing en banc in 15 pages; served 07/28/00. (PANEL) [99-15541] (je)
8/24/00	Filed Appellant Tony Eugene Saffold's response to petition for rehearing in 15 pages and 50 copies; served on 8/23/00. (PANEL and ALL active judges) [99-15541] (je)
5/23/01	Filed order and amended opinion (Judges Betty B. FLETCHER, William C. CANBY, Diarmuid F. O'SCANNLAIN,) (Orig. Opinion id:), The petition for enbanc rehearing IS DENIED. [3960615-1] [99-15541] (vt)

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

PEOPLE OF THE STATE
OF CALIFORNIA

Plaintiff and Respondent

vs.

TONY EUGENE SAFFOLD

Defendant and Appellant

3 Crim. C009223
San Joaquin 40118

REMITTITUR TO COUNTY CLERK

I, ROBERT L. LISTON, Clerk of the Court of Appeal of the State of California for the Third Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion entered in the above entitled cause that has now become final.

WITNESS my hand and the seal of the Court affixed at my office this 20th day of April 1992.

[SEAL]

ROBERT L. LISTON, Clerk

By: G. KELLY Deputy

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated:

County Clerk

By: Deputy

cc: see Mailing List

Name TONY EUGENE SAFFOLD

Address CSP-SOLANO

P.O. BOX 4000 / 6-220L

VACAVILLE, CA. 95696-4000

CDC or ID Number E-62266

/s/ LISA WILLIAMS

SUPERIOR COURT OF CALIFORNIA,

SAN JOAQUIN COUNTY

(Court)

TONY EUGENE SAFFOLD
Petitioner

vs.

Respondent
ANTHONY NEWLAND

PETITION FOR WRIT OF HABEAS CORPUS

No. SC40118A
(To be supplied by the Clerk of the Court)

INSTRUCTIONS – READ CAREFULLY

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.

- If you are filing this petition in the Court of Appeal, file the original and four copies.
- If you are filing this petition in the California Supreme Court, file the original and thirteen copies.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Form Approved by the
Judicial Council of California
MC-275 [Rev. January 1, 1992]

This petition concerns

##	A conviction	_____	Parole
_____	A sentence	_____	Credits
_____	Jail or prison conditions	_____	Prison discipline
_____	Other *(specify)*: _____		

1. Your name Tony Eugene Saffold

2. Where are you incarcerated? CSP-Solano P.O. Box 4000 Vacaville, Ca. 95696-4000

3. Why are you in custody? [##] Criminal Conviction
   [ ] Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

   a. If criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon") or state reason for civil commitment: Murder/robbery with firearm & assault w/firearm and use of a firearm.

   b. Penal or other code sections: 187; 211; and 12022.5; 245(a)(2).

   c. Name and location of sentencing or committing court: San Joaquin County Superior Court Stockton, Ca.

   d. Case number: 40118

   e. Date convicted or committed: April 3, 1990

   f. Date sentenced: July 20, 1990

   g. Length of sentence: 30 years to life

   h. When do you expect to be released? Indeterminate sentence

   i. Were you represented by counsel in the trial court? [##] Yes. [ ] No. If yes, state the attorney's name and address: Ralph Cingcon and co-counsel Michael Platt, 125 Bridge PL Suite 201, Stockton, Ca. 95202.

4. What was the LAST plea you entered? (check one)
   [##] Not guilty [ ] Guilty
   [ ] Nolo Contendere [ ] Other _____

5. If you pleaded not guilty, what kind of trial did you have?
   [##] Jury [ ] Judge without a jury
   [ ] Submitted on transcript
   [ ] Awaiting trial

6. GROUNDS FOR RELIEF

   Ground 1: State briefly the ground on which you base your claim for relief. (For example. "the trial court imposed an illegal enhancement.") *If you have additional grounds for relief, use a separate page for each ground. Page 4 is designed so you can state ground 2. For additional grounds, make copies of page 4 and number the additional grounds in order.* Trial counsels (Ralph Cingcon and Michel Platt), provided ineffective assistance of counsel.

   a. Supporting facts:
   Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at what time *(when)* or place *(where). (If available attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

   Trial counsel and co- counsel failed to adequately prepare for a motion hearing to exclude identification evidence; and failed to inform the jury that witness Mrs. Michel had identified

someone else other than petitioner on two separate occasions as the perpetrator of the offense.

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

(See attached Memorandum of Points and Authorities)

7. Ground 2 (If applicable):

Defense counsel who represented petitioner, Ms. Patricia Ferguson, provided ineffective assistance of counsel for failing to request a physical linup.

a. Supporting facts:

Defense counsel failed to request a physical linup when it was warranted where the witness, Mrs. Michel, had only made a tentative identification of petitioner as the suspect and had identified someone other than petitioner as the suspect. Also another witness, Ms. Michelle Haye, had identified someone other than petitioner as the suspect.

b. Supporting cases, rules, or other authority:

(See attached Memorandum of Points and Authorities)

8. Did you appeal from the conviction, sentence, or commitment? [##] Yes. [ ] No. If your answer is yes, give the following information about your appeal:

Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court")

Third Appellate District

Result Affirmed Date of decision January 27, 1992

Case number or citation of opinion, if known 3 Crim. C009223

Issues raised: a. Court gave erroneous jury instruction.

b. Shoe printed admitted in violation of Kelly-Frye.

c. Sentencing errors.

d. Jury did not reach unanimous decision on statutory law on murder

Were you represented by counsel on appeal? [##] Yes. [ ] No. If yes, state the attorney's name and address, if known. Kyle Gee 2626 Harrison Street Oakland, Ca. 94612

9. Did you seek review in the California Supreme Court?
[ ] Yes. [##] No. Result denied

Date of decision _____ Case number or citation of opinion, if known _____

Issues raised: a. Sentencing error.

b. Jury did not reach unanimous decision on statute for murder

c. _____

d. _____

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal: Appellat attorney refused to raise issues on appeal. He informed me

that he do not file ineffective assistance of counsel claims.

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In Re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].)

Explain what administrative review you sought or explain why you did not seek such review:

b. Did you seek the highest level of administrative review available? [ ] Yes. [ ] No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you previously filed any petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? [ ] Yes. If yes, continue with number 13. [##] No. If no, skip to number 15.

13. (1) Name of court _____

Nature of proceeding (for example, "habeas corpus petition") _____

Issues raised: a. _____

b. _____

c. _____

Result *(Attach order, if available)* _____ Date of decision _____

(2) Name of court _____

Nature of proceeding _____

Issues raised: a. _____

b. _____

c. _____

Result *(Attach order, if available)* _____ Date of decision _____

For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result.

_____

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

_____

16. Are you presently represented by counsel? [ ] Yes. [##] No. If yes, state the attorney's name and address, if known.

_____

17. Do you have any petition, appeal, or other matter pending in any court? [ ] Yes. [##] No. *If yes, explain.*

_____

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court.

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: April 17, 1997

/s/ Tony E. Saffold, Sr.
(Signature of Petitioner)

[LOGO]

CHAMBERS OF
The Superior Court
THIRD FLOOR COUNTY COURTHOUSE
STOCKTON, CALIFORNIA 95202

TELEPHONE
(209) 468-2827

MAY 23, 1997

RE: CASE# SC 40118 A
WRIT OF HABEAS CORPUS

DEAR MR. SAFFOLD,

WE RECEIVED A LETTER FROM YOU INQUIRING THE LENGTH OF TIME YOUR PETITION WAS RECEIVED.

THE ENVELOPE WAS POSTMARKED APRIL 21, 1997; HOWEVER, WE HAVE NO EXPLANATION OR KNOWLEDGE AS TO THE LENGTH OF TIME FOR MAIL TO GET TO US IN THE CLERK'S OFFICE. THE PETITION WAS RECEIVED AND FILED. A REPONSE OR ANSWER WILL BE GIVEN TO YOU FROM THE COURT AS SOON AS PRACTICABLE.

SINCERELY,

/s/ Lisa Williams
LISA WILLIAMS

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

In the Matter of the Petition of	)	CASE NO.
TONY EUGENE SAFFOLD	)	SC 40118A
	)	ORDER
For Writ of Habeas Corpus.	)	
	)	(Filed June 9, 1997)

It appearing that a petition for Writ of Habeas Corpus has been filed herein on May 1, 1997, and good cause appearing therefore,

IT IS HEREBY ~~ORDERED~~ THAT the petition is denied for the reasons stated below.

Petitioner was convicted of first degree murder, assault with a deadly weapon, and two counts of robbery. The conviction arises out of a robbery of the El Mexicano Restaurant which was owned by Augustin and Maria Michel. Evidence at trial indicated petitioner entered the restaurant/deli shortly after 7:00 a.m. on September 29, 1986, took a beer from a refrigerator, went to the cash registered, and, demanded that Augustin give him the money, pointing a gun at him. When Augustin said there was no money, petitioner fired twice, hitting Augustan once. Petitioner then threatened Maria with the gun, ordering her to give him the money from the cash registered, and fled. Augustan and Maria were the only ones present when the robbery occurred. Augustan died as a result of his gunshot wound.

Petitioner contends he received ineffective assistance from trial counsel because counsel failed to request a line-up prior to the preliminary hearing. Maria told the police

that she recognized the robber as someone who had been in the deli before as a customer. She identified petitioner from two separate photo line-ups within a few days after the robbery. It was the identification from a photo line-up that led to petitioner's arrest. Although Maria's photo line-up identification was somewhat tentative, the failure of petitioner's counsel to request a line-up was not ineffective representation. If Maria identified petitioner in a line-up, her identification of him would only be confirmed, diminishing the argument that her photo identification was weak. The likelihood that Maria would not identify him after having been exposed to two photographs of him was unlikely. It was reasonable for defense counsel to determine that a line-up was not worth the risk that the identification would only be confirmed.

Petitioner contends he received ineffective assistance of counsel because his attorney was not prepared to argue a pre-trial motion to exclude identification evidence and because his attorneys failed to adequately litigate the identification testimony. The Court has reviewed the transcript of the hearing on the motion to exclude identification evidence and finds that the delay in the motion was due to the failure of the prosecution to produce the original photo line-up. Petitioner's attorney demonstrated a high degree of competence by preserving motion options until the original photo line-up would be available and could be examined. There is no indication that the motion to exclude identification evidence was compromised or that petitioner was deprived of a potentially meritorious defense. Further there is no evidence that petitioner's counsel failed in any other manner to adequately litigate identification issues.

Petitioner contends he was deprived of effective assistance of counsel because his attorneys failed to call his mother and father, known alibi witnesses, to testify at his trial. Petitioner's parents testified at the preliminary hearing and were questioned about his whereabouts at the time of the robbery. Neither parent could affirmatively testify that petitioner was at home at the time. In view of their preliminary hearing testimony, it was reasonable for petitioner's attorneys to decide not to call them to testify at trial.

Date: [Illegible] /s/ Frank A. Grande
Judge of the Superior Court

Name TONY EUGENE SAFFOLD

Address CSP-SOLANO
P.O. BOX 4000 / 6-220L
VACAVILLE, CA. 95696-4000

CDC or ID Number E-62266

COURT OF APPEAL OF THE STATE OF CALIFORNIA,
THIRD APPELLATE DISTRICT
(Court)

TONY EUGENE SAFFOLD
Petitioner

vs.

Respondent
ANTHONY NEWLAND

PETITION FOR WRIT OF HABEAS CORPUS

No. 3 CRIM C 026811
(To be supplied by the Clerk of the Court)
See C009223

(Filed Jun. 18, 1997)

INSTRUCTIONS – READ CAREFULLY

- Read the entire form *before* answering any questions.
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- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."

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Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Form Approved by the
Judicial Council of California
MC-275 [Rev. January 1, 1992]

This petition concerns

###	A conviction	_____	Parole
_____	A sentence	_____	Credits
_____	Jail or prison conditions	_____	Prison discipline
_____	Other *(specify)*:	_____	

1. Your name Tony Eugene Saffold
2. Where are you incarcerated? CSP-Solano P.O. Box 4000 Vacaville, Ca. 95696-4000
3. Why are you in custody? [##] Criminal Conviction [ ] Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

a. If criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon") or state reason for civil commitment: Murder/robbery with firearm & assault w/firearm and use of a firearm.

b. Penal or other code sections: 187; 211; and 12022.5; 245(a)(2).

c. Name and location of sentencing or committing court: San Joaquin County Superior Court Stockton, Ca.

d. Case number: 40118

e. Date convicted or committed: April 3, 1990

f. Date sentenced: July 20, 1990

g. Length of sentence: 30 years to life

h. When do you expect to be released? Indeterminate sentence

i. Were you represented by counsel in the trial court? [##] Yes. [ ] No. If yes, state the attorney's name and address: Ralph Cingcon and co-counsel Michael Platt, 125 Bridge PL Suite 201, Stockton, Ca. 95202.

4. What was the LAST plea you entered? (check one)
[##] Not guilty [ ] Guilty
[ ] Nolo Contendere [ ] Other _____

5. If you pleaded not guilty, what kind of trial did you have?
   [##] Jury [ ] Judge without a jury
   [ ] Submitted on transcript
   [ ] Awaiting trial

6. GROUNDS FOR RELIEF

   Ground 1: State briefly the ground on which you base your claim for relief. (For example. "the trial court imposed an illegal enhancement.") *If you have additional grounds for relief, use a separate page for each ground. Page 4 is designed so you can state ground 2. For additional grounds, make copies of page 4 and number the additional grounds in order.* Trial counsels (Ralph Cingcon and Michel Platt), provided ineffective assistance of counsel.

   a. Supporting facts:
   Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at what time *(when)* or place *(where). (If available attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

   Trial counsel and co- counsel failed to adequately prepare for a motion hearing to exclude identification evidence; and failed to inform the jury that witness Mrs. Michel had identified

someone else other than petitioner on two separate occasions as the perpetrator of the offense.

   b. Supporting cases, rules, or other authority (optional):

   (Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

   (See attached Memorandum of Points and Authorities)

7. Ground 2 (*If applicable*):

   Defense counsel who represented petitioner, Ms. Patricia Ferguson, provided ineffective assistance of counsel for failing to request a physical linup.

   a. Supporting facts:

   Defense counsel failed to request a physical linup when it was warranted where the witness, Mrs. Michel, had only made a tentative identification of petitioner as the suspect and had identified someone other than petitioner as the suspect. Also another witness, Ms. Michelle Haye, had identified someone other than petitioner as the suspect.

   b. Supporting cases, rules, or other authority:

   (See attached Memorandum of Points and Authorities)

8. Did you appeal from the conviction. sentence, or commitment? [##] Yes. [ ] No. If your answer is yes, give the following information about your appeal:

   Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court")

Third Appellate District

Result Affirmed Date of decision January 27, 1992

Case number or citation of opinion, if known 3 Crim. C009223

Issues raised: a. Court gave erroneous jury instruction.

b. Shoe printed admitted in violation of Kelly-Frye.

c. Sentencing errors.

d. Jury did not reach unanimous decision on statutory law on murder

Were you represented by counsel on appeal? [##] Yes. [ ] No. If yes, state the attorney's name and address, if known. Kyle Gee 2626 Harrison Street Oakland, Ca. 94612

9. Did you seek review in the California Supreme Court?
[ ] Yes. [##] No. Result denied

Date of decision _____ Case number or citation of opinion, if known _____

Issues raised: a. Sentencing error.

b. Jury did not reach unanimous decision on statute for murder

c. _____

d. _____

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal: Appellat attorney refused to raise issues on appeal. He informed me

that he do not file ineffective assistance of counsel claims.

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In Re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].)

Explain what administrative review you sought or explain why you did not seek such review:

b. Did you seek the highest level of administrative review available? [ ] Yes. [ ] No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you previously filed any petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? [##] Yes. If yes, continue with number 13.
[ ] No. If no, skip to number 15.

13. (1) Name of court Superior Court of San Joaquin County

Nature of proceeding (for example. "habeas corpus petition") habeas corpus

Issues raised: a. Trial counsels provided ineffective assistance of counsel.

b. _____

c. _____

Result *(Attach order, if available)* denied Date of decision June 9, 1997

(2) Name of court _____

Nature of proceeding _____

Issues raised: a. _____

b. _____

c. _____

Result *(Attach order, if available)* _____ Date of decision _____

For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result.

_____

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

_____

16. Are you presently represented by counsel? [ ] Yes. [##] No. If yes, state the attorney's name and address, if known.

_____

17. Do you have any petition, appeal, or other matter pending in any court? [ ] Yes. [##] No. *If yes, explain.*

_____

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court.

_____

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: June 14, 1997

/s/ Tony Saffold
(Signature of Petitioner)

_____

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

IN RE TONY E. SAFFOLD ON HABEAS CORPUS
Petitioner

3 Crim. C026811
Solano
(Filed June 26, 1997)

By the Court:

The petition for writ of habeas corpus is denied.

Dated: June 26, 1997

/s/ Davis
DAVIS, Acting P.J.

---

cc: See Mailing List

Name TONY EUGENE SAFFOLD

Address P.O. BOX 4000
VACAVILLE, CALIFORNIA
95696-4000

IN PROPRIA PERSONA

CDC or ID Number E-62266

CALIFORNIA STATE SUPREME COURT

(Court)

TONY EUGENE SAFFOLD
Petitioner

vs.

Respondent
A.C. NEWLAND, WARDEN

PETITION FOR WRIT OF HABEAS CORPUS

No. S065746
(To be supplied by the Clerk of the Court)

(Filed Nov. 13, 1997)

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Form Approved by the
Judicial Council of California
MC-275 [Rev. January 1, 1992]

This petition concerns

#	A conviction	____	Parole
____	A sentence	____	Credits
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2. Where are you incarcerated? CSP-Solano P.O. Box 4000 Vacaville, Ca. 95696-4000
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Answer subdivisions a. through i. to the best of your ability.

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d. Case number: 40118

e. Date convicted or committed: April 3, 1990

f. Date sentenced: July 20, 1990

g. Length of sentence: 30 years to life

h. When do you expect to be released? Indeterminate sentence

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[##] Not guilty [ ] Guilty
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   [##] Jury [ ] Judge without a jury
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6. GROUNDS FOR RELIEF

   Ground 1: State briefly the ground on which you base your claim for relief. (For example. "the trial court imposed an illegal enhancement.") *If you have additional grounds for relief, use a separate page for each ground. Page 4 is designed so you can state ground 2. For additional grounds, make copies of page 4 and number the additional grounds in order.* PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL TO HIS PREJUDICE

   a. Supporting facts:
   Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at what time *(when)* or place *(where). (If available attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

   Trial counsel failed in the following areas:
   1. He failed to motion to suppress the identification testimony of the key prosecution witness, though the motion would have likely been

successful, and would have been entertained by the trial court.
2. Trial counsel failed to request a pre-trial line up.
3. In lieu of a pre-trial lineup and or a motion to suppress counsel failed to cross-examine the key prosecution witness as to her inconsistent descriptions, her inability to identify anyone positively, and her two prior identifications of someone other then the petitioner, one of those in court in preliminary hearing, leaving the identification unimpeached before the jury.
4. Counsel failed to adequately investigate and prepare for the identification supression motion, and withdrew the motion because of his incompetence. 5. Failed to call crucial alibi witnesses. Please see Memo of law for further facts and argument.

   b. Supporting cases, rules, or other authority (optional):

   (Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

   Please see attached memorandum of facts and law

7. Ground 2 *(If applicable)*:

   a. Supporting facts:

   b. Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment? [##] Yes. [ ] No. If your answer is yes, give the following information about your appeal:

   Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court")

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Explain what administrative review you sought or explain why you did not seek such review:

b. Did you seek the highest level of administrative review available? [ ] Yes. [ ] No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you previously filed any petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? [X] Yes. If yes, continue with number 13. [ ] No. If no, skip to number 15.

13. (1) Name of court SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN JOAQUIN

Nature of proceeding (for example. "habeas corpus petition") HABEAS CORPUS

Issues raised: a. SAME AS THIS PETITION

b. _____

c. _____

Result *(Attach order, if available)* DENIED Date of decision June 9, 1997

(2) Name of court CALIFORNIA COURT OF APPEAL THIRD APPELLATE DISTRICT

Nature of proceeding HABEAS CORPUS

Issues raised: a. SAME AS THIS PETITION

b. _____

c. _____

Result *(Attach order, if available)* Denied Date of decision June 26, 1997 Petitioner served on 11-10-97

For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result.

_____

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

Any delay in this action was caused by appellate counsels failure to raise the issues or investigate the issues on direct appeal, and petitioner had to hire an investigator to gather information and evidence so that he could make the comprehensive showing and prejudice required by this court.

16. Are you presently represented by counsel? [ ] Yes. [X] No. If yes, state the attorney's name and address, if known.

_____

17. Do you have any petition, appeal, or other matter pending in any court? [ ] Yes. [X] No. *If yes, explain.*

_____

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court.

This is the proper court

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: November 10, 1997

/s/ Tony Eugene Saffold
(Signature of Petitioner)
TONY EUGENE SAFFOLD,
PETITIONER
IN PROPRIA PERSONA

_____

CALIFORNIA STATE SUPREME COURT

TONY EUGENE SAFFOLD,
Petitioner

vs.

ANTHONY NEWLAND
Respondent

Case No. ___

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION FOR WRIT
OF HABEAS CORPUS

STATEMENT OF THE CASE

Petitioner Tony Eugene Saffold brings this petition for writ of Habeas Corpus from a judgement of conviction after a jury verdict of guilty of violation of Penal Code §187, murder (first degre); two violations of Penal Code §211, robbery; and Penal Code §245(a)(2), assault with a firearm. There were §12022.5 firearm use findings as to all counts except the assault.[1] Petitioner was originally charged by information filed May 29, 1987, with one violation of section 187, two violations of §211, and one violation of §245(a)(2). A robbery specially circumstances was aleged under §190.2(a)(17)(i). (CT 1-3).[2]

Jury trial commenced on November 15, 1989. (CT 738). On March 6, 1990, the court denied Petitioner's

[1] All code references are to the Penal Code, unless otherwise noted.

[2] Clerk Transcripts.

motion to dismiss the specially circumstances allegation. (CT 849-850.)

On April 3, 1990, the jury returned a guilty verdict of first degree murder with a §12022.5., finding, but found the special circumstances allegation not to be proven. The jury also found petitioner guilty of the two counts of robbery, with use findings as to each, and guilty of the section 245(a)(2), assault. (CT 874-875.)

Petitioner's motion for a new trial was denied on June 21, 1990. (CT 1051.)

On July 2, 1990, petitioner was sentenced as follows: a three-year middle term on one of the robbery counts was set as the base term under Penal Code section 1170; a concurrent three-year middle term was imposed on the assault count; a consecutive term of twenty-five years to life was imposed on the murder, with a two-year enhancement. The other robbery counts were stayed pursuant to Penal Code §654. (CT 1052-1053.) Petitioner filed a timely notice of appeal. (CT 1187-1190.)

STATEMENT OF FACTS

A. The evidence of Events Prior to the Homicide.

Rodney Reece, who was originally charged with robbery and murder in this case, testified for the prosecution. (RT 5138.)[3] Reece agreed to testify against Saffold (petitioner) as a part of a negotiated plea in which he pled guilty to robbery. (RT 5011, 5133, 5145, 5147.)

[3] Reporter's transcript.

Reece served approximately three years and five months on the robbery. RT 5151. As an additional benefit, other instances of criminal conduct against Reece were either not charged or dismissed. RT 5136-5137.

Reece testified regarding events on September 28 and 29, 1986. On those days Reece and Mr. Saffold had been driving around in Reece's green and white 1971 Dodge Dart. RT 5085.

Reece claimed he "pawned" a gun to Mr. Saffold in exchange for a $20 rock of cocaine, on September 28th. RT 5038-5039. Reece smoked the cocaine near the house of a Mexican family. RT 5041. After an argument with members of the Mexican family, he was threatened at gunpoint and forced to run away. RT 5044-5050. Reece wanted to get even for the threat, so he retrieved his gun from Saffold. RT 4996, 5067. He then went back and fired several shots at the house. RT 5073-5074.[4]

Later, Reece decided he should return to the house to "finish what he started." He again ran into Mr. Saffold, who warned Reece that, if he returned, the police would arrest him. RT 4997-4998. The two bought some drinks and bought rocks to smoke. RT 4998, 5088. Reece returned the gun to Mr. Saffold, until he could repay him the $20. RT 5089.

At about 1:00 a.m. on September 29, Reece stopped on Eighth Street to offer one Mercedes Cardona a ride. RT 4986, 5090, 5691, 5709. Reece claimed he asked her if she

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[4] Reece also described another incident involving his having shot at a Corvette. RT 5118-5121.

needed a ride, and she threw a beer bottle at him. RT 5988, 5090.

Reece alleged he then slapped Ms. Cardona, and when she screamed, he put her in the car. RT 5988, 5092-5093. After he had inadvertently divulged Saffold's first name, Reece decided he had to kill Ms. Cardona (RT 5990, 5097), and he told her his intent. RT 5104, 5702, 5726.[5] Reece drove to a secluded spot by Johnny's Creek, intending to drown her. RT 4992, 5103, 5701. Ms. Cardona managed to get away and jump in the water. RT 5704. Reece claimed that Saffold had fired shots at the woman. RT 4993, 5109.

(B) The Homicide.

Reece and Saffold later went to buy some beer at the El Mexicali Restaurant on Main Street. According to Reece, it was still daylight. RT 4977.

Reece claimed it was Mr. Saffold's idea to stop there. RT 4978. When they stopped on Sullivan Street, near the El Mexicali, Saffold told Reece he intended to rob the restaurant. Reece started the car again to prevent Mr. Saffold, from doing so. RT 4979.

When Mr. Saffold told Reece he was only joking, so Reece returned to the same spot to allow Saffold could buy the beer. RT 4980. According to Reece, he fell asleep when Saffold left the car. RT 4981. Reece asserted he did not know how long Saffold was gone. RT 4980.

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[5] Cardona stated that the passenger (Saffold) told the driver (Reece) to let her go. RT 5702.

Mrs. Michel was in the kitchen at the El Mexicali Restaurant when the robbery occurred. RT 4853. The restaurant had opened for business at 7:00 a.m. RT 4854. One customer – a short, thin black man – had come in that day prior to the robber. RT 4868-4869.[6]

Mrs. Michel identified Mr. Saffold in court as the second person to come into the restaurant that morning.[7] He had come in two or three minutes after the first customer had left, wearing a yellow, short-sleeved shirt. She was certain it had not been orange. RT 4871-4872.[8] She recognized Mr. Saffold as having been in the restaurant two or three times on previous days. RT 4881.

Mrs. Michel saw the robber enter the restaurant, go to the beer cooler, obtain a beer, and approach the cash register. RT 4882, 4884, 4947. He told Mr. Michel, who was near the cash register, "Give me the money." Mr. Michel replied in Spanish, "What money." The robber thereupon shot Mr. Michel. RT 4890.[9]

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[6] At the preliminary hearing, Mrs. Michel had stated she could not identify the customer. RT 4937. In a statement she gave to police she described the customer as a Mexican male in his 20's. RT 5472.

[7] Mrs. Michel stated that Mr. Saffold, at the time of trial, was a littler heavier with shorter hair than when he had robbed the store. RT 4965-4966.

[8] She told a police officer the suspect was wearing a yellow-gold shirt and had short hair. RT 4939.

[9] Mrs. Michel originally told police that she was not paying much attention before she heard her husband open the cash register to make change. RT 4946.

Mrs. Michel started to scream. A second shot was fired. RT 4891. Mr. Michel came into the kitchen area and threw himself on the floor. RT 4982. He told Mrs. Michel, "Get down, they're going to kill you." RT 4892.

The robber told Mrs. Michel to give him the money. RT 4893. He pointed the gun at her. RT 4957. She complied because she thought he would kill her. RT 4893. She took money out of the register and put it into the bag holding the beer. RT 4894. The man took some food stamps out of the register, put them in the bag, and fled. RT 4895.

(C) Investigation.

The first police officer arrived at the scene at 7:10 a.m. RT 5422. He interviewed Ms. Michel but had some trouble communicating with her in Spanish. RT 5419. The officer did ascertain from Ms. Michel that the suspect was a black male. RT 5419.[10]

The cause of Mr. Michel's death was a single gunshot wound to the left front of his neck. RT 5059. The bullet was recovered and given to police. RT 5059, 5443.[11]

Another officer interviewed Ms. Michel in Spanish at the hospital. RT 5471. Ms. Michel told him she thought the assailant lived in the area, because he had previously been in the store. RT 5481-5492. She described the man as

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[10] He ascertained from another witness, Emilio Junez, that the suspect was wearing a yellow-gold shirt and blue pants. RT 5430.

[11] A second expended bullet was found at the restaurant by police.

a Negro male, 24-26 years old, 5'8" to 5'9", with a thin build, a thin face with a mustache, and a medium to light complexion. RT 5482. The man had brown eyes and black hair about one inch off of his forehead. RT 5483. She stated she would be able to recognize the man. RT 5482.

The police used an electrostatic dust print lifter to obtain footprints at the restaurant. RT 5580-5581. Five footprint impressions were taken and processed into photographs. RT 5622, 5628, 5642.

The police put together a photo lineup which included a photo of Mr. Saffold. The lineup was shown to Ms. Michel on October 3, 1987. RT 5450-5451, 5484. Mrs. Michel identified Mr. Saffold's photograph, stating that she was almost positive it was him. RT 5485-5486, 5502, 5450.[12]

Mrs. Michel was shown several T-shirts including an orange one. She did not identify any of these as being the one worn by the perpetrator. RT 5417.

Police then went to Mr. Saffold's home. RT 5451. Mr. Saffold initially denied who he was. RT 5451-5452. When confronted with the photo that Mrs. Michel had identified, he agreed to go with police. RT 5452. Mr. Saffold was not wearing shoes so his father got a pair of tennis shoes for him to wear. RT 5453.

At the police department, an officer noticed that the tennis shoes were Pro Wings, the brand police believed

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[12] When police showed her a picture of Rodney Reece and asked if that could have been the person, she said definitely not. RT 4963-4964, 5868-5869.

had left the footprints found at the restaurant. RT 5509. There was a trial stipulation that two of the prints lifted from the restaurant matched Mr. Saffold's shoes. RT 5655-5656.

On October 4, the police obtained a search warrant to search Mr. Saffold's house. RT 5458, 5515. They retrieved five yellow shirts, some pants, a firearm, and some loose .22 caliber shells. RT 5516-5519. The police compared the two .22 caliber slugs with slugs test-fired from the gun obtained from the Saffold residence. RT 5662-5663. In the opinion of police, that gun probably was the gun that fired the fatal bullet. They could not state positively because of the damage to the evidence bullet. RT 5673.

(D) Post-Homicide Events.

According to Reece, Saffold had returned to the car and told him he had robbed the store. RT 4983. Reece asked to see the bullets. Reece saw there were three empty cartridges. RT 4985. Mr. Saffold admitted to Mr. Reece having shot someone. RT 5005.[13]

Reece was certain that Mr. Saffold had entered the restaurant with the same orange shirt he had worn the night of September 28th. RT 5200. Reece told Mr. Saffold to change his shirt and to put on one of Reece's shirts. RT 5201.[14]

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[13] When asked if he had killed Michel, Reece stated that he didn't. He said if he had killed Michel he would have killed his wife also. RT 5005.

[14] Reece later gave this shirt to his girlfriend, Carolyn Williams, and told her to hold it for him. He told her that, if

According to Reece, he and Saffold thereafter bought and smoked some more rock cocaine. RT 5011. The two went to McKinley Park where they saw Carolyn Williams. RT 5002. Williams asked Reece where he had been all night, and Mr. Saffold replied, "We've been out pulling 211's." RT 5004.

Ms. Williams testified that she saw Reece and Saffold in McKinley Park at about 8:00 a.m. RT 5285. It was Reece who had bragged that he had robbed some people. RT 5290.

At trial, Ms. Williams denied that Mr. Saffold had made any direct statements to her. RT 5291. She did not recall making different statements to police. RT 5296-5299.[15] She stated that, if she had make conflicting statements to police, it was probably because she was under the influence and mad at Reece. RT 5297. She stated she was a drug user for 21 years and did not remember a lot of things she had said. RT 5309.

Ms. Williams also denied the validity of testimony she had given at Mr. Saffold's preliminary hearing, (RT 5310-5312), stating she either had misunderstood the questions, or hadn't clarified her testimony well enough.

Tony got "busted" and the police came looking for him, he would give police the shirt. RT 5209-5210. Williams acknowledged that Reece had given her the T-shirt, which she later turned over to police. RT 5294, 5548.

[15] Various remarks contained in a statement she gave police were read to Ms. Williams to refresh her recollection. RT 5293-5305.

RT 5312. Anything that was said to her was said by Reece and not by Tony Saffold. RT 5308, 5311, 5313, 5315, 5322.[16]

Audio-taped police interviews of Rodney Reece and Carolyn Williams were made on October 11 and played for the jury. RT 5768, 5863-5864, 5899.[17]

(E) The Defense.

The defense was that Roidney Reece, and not Tony Saffold, had not committed the robbery-murder. The defense acknowledged that Mr. Saffold had entered the restaurant on the morning of the homicide but alleged that he had left the restaurant before the crimes were committed.

Tony Saffold testified that he was shot in 1978. RT 6316. He spent time in a hospital and was treated with morphine for pain. RT 6317. He turned to cocaine in 1979. RT 6318. He acknowledged selling and smoking cocaine. RT 6320.

Mr. Saffold corroborated much of Reece's testimony concerning the incidents prior to the homicide. RT 6330-6334. He said he had changed out of his orange shirt and put on a blue shirt of Reece's, earlier the night of September 28th, while they were at the creek. RT 6337.

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[16] A police officer testified that, when he responded to a call in relation to the beating of Carolyn Williams, Ms. Williams stated that both Reece and Saffold had made incriminating statements to her about the homicide. RT 5544.

[17] Seven excerpts from Ms. Williams' preliminary hearing testimony were read to the jury. RT 5900-5908.

Mr. Saffold stated that he and Reece had spent several hours before daybreak smoking and selling rock cocaine. RT 6339-6340. When Mr. Saffold sold the last of his cocaine he told Reece he wanted to go home. RT 6340.

They drove towards Saffold's house, and Saffold asked Reece to stop so he could get a burrito. RT 6341, 6465. They stopped at the El Mexicali Restaurant. RT 6341. Saffold denied they had parked on Sullivan Street. Saffold said it was had not yet been daylight, but the sun was coming up.[18] Reece asked Saffold whether he thought the place had any money, and Saffold answered no. RT 6341.

Reece asked Saffold to get him a burrito and a beer. Saffold went in, got a beer, and took it to the counter. He asked for two burritos. RT 6341, 6467. Mr. Michel brought the two burritos and gave Saffold his change. RT 6342. Mr. Saffold was in the store for three to five minutes. RT 6468.

Reece dropped Mr. Saffold off at his home, which was a few blocks from the restaurant. RT 6468. Mr. Saffold lay down in the den and fell asleep. RT 6342-6343.

Later that morning, Reece returned to Saffold's house. RT 6343, 6470. Reece convinced Saffold to go and buy some more cocaine, giving Saffold his gun. RT 6344.

They bought and sold some of the cocaine. RT 6344-6345. Thereafter, Saffold at Reece's request accompanied Reece to see Ms. Williams. RT 6345. Mr. Saffold

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[18] There was a stipulation that sunrise that morning had been at 6:59 a.m.

described seeing Ms. Williams with Reece while Mr. Saffold talked to her friend, Donna Heckerson. RT 6347-6348. Reece then took Mr. Saffold home. RT 6349-6350. Reece never gave Saffold the money to retrieve his gun. RT 6350-6352.

Saffold testified that he is almost 6' tall and that, at the time of the homicide, his hair had been collar length in jeri curls. RT 6480-6481. Mr. Saffold denied any involvement in the robbery-murder. RT 6492.

Michelle Hayes testified that, on the morning of September 29, 1986, she had been at a bus stop on Sullivan and Main at about 6:40 or 6:45 a.m. RT 5992-5993. A car door had opened right in front of her. RT 5994. She saw two black males in the car. RT 5994. The car was a faded blue metallic Mustang II.[19] RT 5995. The car drove away but then returned. RT 5999-6000. She saw the passenger, an "older guy," peer around the corner onto Main Street and toward the El Mexicali Restaurant. Her bus then came, and she left. RT 6002, 6019, 6168.[20]

Ms. Hayes was shown two photo lineups by police. RT 6003, 6005. She wasn't sure if she picked Mr. Saffold out of one lineup.[21] RT 6003. She did pick out one Thomas

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[19] The car in defense exhibit 101 was not the car she saw. RT 5997. She was shown a picture of Reece's car by police, which she said she did not recognize. RT 6162, 6179.

[20] She mentioned in her police report the older man was about 35 years old. RT 5998.

[21] In Court, she acknowledged she had said, "It's not really like any of these guys," but that, "If it is like any it's like him," identifying Saffold's photograph. RT 6004.

Ridean out of the other lineup as the passenger in the car. RT 6005-6006.

Emilio Junez was at Sullivan and Main at about 6:45 a.m. on September 29, 1986. RT 6083-6084. About five minutes later he heard loud voices arguing. RT 6085-6086. He heard two shots and saw a man running out of the restaurant. RT 6086. He could not tell the race of the man because he was too far away. He could tell he had short black hair. RT 6087. The man was wearing a yellow shirt and blue pants. RT 6088-6089.[22]

A psychologist, Dr. Robert Shomer, testified on eyewitness identifications. He described his specialty as the factors that go into an eyewitness identification. RT 6229. He described various such factors. RT 6233-6258.

One obvious factor is opportunity to observe the perpetrator. RT 6233. He discussed how the level of stress plays an important role in making an accurate identification. According to research, a person who is under extreme stress is far less accurate in making identifications. RT 6235.

Dr. Shomer described another factor as "weapon focus." He noted that, when a weapon is present, a witness tends to focus on the weapon more than anything else. RT 6257.

Dr. Shomer also discussed the term "unconscious transference." RT 6258. He stated that, if a witness is familiar with someone because the witness had seen the

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[22] He told police the man turned south on Sullivan Street. RT 6048.

person previously, and if the witness later sees the person in a lineup, the witness might identify that individual as the perpetrator because of innocent familiarity. RT 6259.[23]

Maria Castillo testified regarding an incident four days before the homicide in which her purse had been stolen from her car outside the restaurant. RT 5935. Mrs. Castillo described the robber to police as a black man, 22 to 23 years of age, 6 feet tall, with a skinny build, short hair, and a dark complexion, wearing a baseball cap. RT 5937-5938.

Mrs. Michel knew about Mrs. Castillo's purse being stolen, and had been told the robber's description. On the day of the Michel homicide, Mrs. Michel told Mrs. Castillo she thought the killer was the same man who had taken Mrs. Castillo's purse. RT 5939.

Donna Heckerson More testified that she and Carolyn Williams had seen Rodney Reece on September 29, 1986. RT 6096, 6104. While Reece and Williams were talking, Ms. Heckerson sat in Reece's car and had a conversation with a stranger. RT 6106. She could not identify Mr. Saffold as the man, because they only talked for five minutes. RT 6106. She did note that the stranger in the car had shoulder length hair with the wet curly look. RT 6108.[24]

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[23] On cross-examination, Dr. Shomer did acknowledge that unconscious transference is less likely under the circumstances of this case. RT 6303-6304.

[24] While testifying, she did not remember what the stranger was wearing but, in a police statement in 1986, she stated he was wearing a light shirt, with a white tee shirt. RT 6131-6132.

Ms. Heckerson stated that she spoke with Reece the next day about the robbery. RT 6115-6116. At some point Reece acknowledged to Ms. Heckerson that he was involved, but hadn't pulled the trigger. RT 6135. He acknowledged that the description of the suspect sounded like him. RT 6116, 6122. He discussed with her that the described height and the color of the shirt was wrong. RT 6117, 6122, 6135. He showed Heckerson an orange shirt. RT 6117, 6122. Reece said to Heckerson that they got $25 and some food stamps in the robbery. RT 6126.

I.

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

INTRODUCTION:

The evidence in this case consists of accomplice testimony, where, co-defendant was charged only with robbery, and the murder and other felonies were all dismissed against him, for his testimony, the identification testimony of Mrs. Michel, and other witness testimony that incriminated co-defendant Reece, by witness Ms. Williams and a Michelle Hayes. Petitioner testified on his own behalf.

In the instant case trial counsel failed to request a pre-trial line-up, though he was aware that both Mrs. Michel and Ms. Hayes, had both picked other persons in their photo line-ups, both picking Thomas Rideau. Mrs. Michel, again picked Thomas Rideau at preliminary hearing. CT 141; 142 CT 51; 53 CT 64 RT 5991-6006.

There was further incriminating testimony, against co-defendant Reece by a Ms. Heckerson, who testified Reece admitted his involvement in the robbery and showed Heckerson an orange shirt. RT 6115-6116 6117, 6122.

Trial counsel also failed to raise the issue that the police conducted several photo line-ups trying to obtain an identification of petitioner, in that the witness Ms. Michel was unsure CT 147, 148, 140, 141, 139. CT 8 So the police conducted a single photograph line-up using only the petitioner's picture. (See exhibit A). CT 60-61, 61. Actually counsel made a motion to exclude then withdrew that motion based on evidence that was contrary to Mrs. Michel's testimony, and failing to continue on, based on the prior inconsistent descriptions and picking of other persons.

Trial counsel also failed to impeach the identification testimony of Mrs. Michel, with her prior inconsistent description and that on two occassions she picked someone other than the petitioner, a person also selected by Ms. Hayes, evidence the jury should have been told about. Counsels cross-examination of Mrs. Michel's identification was wholly incompetent.

Trial counsel failed to call alibi witnesses that would have corroborated that petitioner didn't commit any murder and he was at home at the time of the crime. Both Mr. Green Staffold and Mrs..Thelma Saffold, who testified at preliminary hearing CT 128 and 132, were willing and available, however, counsel failed to call them.

After the trial court admonished counsel for failing to adequately prepare and present the motion to exclude

identification testimony, counsel admiting his inadequate preparation, stated he received information that undermined his motion, and withdrew the motion to exclude. Exhibit B at p. 159.

Wherefore, it is conclusive that trial counsel failed to conduct a pre-trial line-up, 2. Failed to litigate a meritorious motion to exclude identification testimony, 3. Failed to inform the jury and impeach the identification witnesses testimony with their prior inconsistent statements, identifications, and description, 4. Filed to adequately prepare for the supression motion, and 5. Failed to call crucial alibi witnesses that corroborated petitioner and other defense and prosecution witnesses.

STANDARD OF REVIEW:

In *Waller v. Georgia*, 467 U.S.39, 46 (1984) the U.S. Supreme Court found that a motion to supress is sometimes more important than the trial itself. *Gannett Co. v. Depasaquale* 443 U.S. 368, 397 (1979).

In *U.S. v. Molina* 934 F. 2d 1440, 1447 (9th Cir. 1991) the Court found that when a client who has been identified in an illegal line-up, most attorney's challenge the admission of any evidence related to it. After all a defendant has everything to gain and nothing to lose in filing a motion to supress, especially one involving the sole eyewitness to that crime.

In *Kimmerlman v. Morrison* 477 U.S.365, 381 (1986) the court found constitutionally deficient representation of

counsel, by counsel who failed to file a timely suppression motion because he had done inadequate pre-trial preparation.

In this case the motion was filed, but inadequate pre-trial investigation and preparation, caused counsel to withdraw the motion.

To determine whether counsel was deficient or not as to filing and litigating the motion, the Court has set out a standard. In *James v. Borg*, 24 F. 3d 20, 24 (9th Cir.) 115 S. ct. 333 (1994), the court held that while under no compulsion to bring an unavailing motion, counsel is bound to raise a meritorious one, and in *U.S. v. Quinter-Barraza* 96 Daily Journal D.A.R. 2631 (9th Cir. March 7, 1996), the Court held a meritorious motion is one that would have had to be entertained by the Court.

In this case, the motion to exclude was based upon very sound evidence. 1. Mrs. Michel testified she was shown a single photograph of the petitioner, by the police and prosecution, patently suggestive, *Stovall v. Denno* 388 U.S.293 (1967); 2. The witness identified someone other than petitioner on two occassions, one of them during preliminary hearing, picking a person consistent with another eyewitness (Ms. Hayes), also not petitioner (they picked the same person), both witnesses gave descriptions other then petitioner's, admitted inattention, and were uncertain at the time of confrontation, failing to meet even one prong of *Neil v. Biggers* 409 U.S. 188, 200-201 (1972), 3. The procedure of using a single photograph of a suspect, to single him out is a violation of due process *People v. Hunt* (1977) 19 Cal. 3d 888, 894, *People v. Phan* (1993) 14 al. App. 4th 1453. 4. The multiple photo

line-ups, with the single photo of petitioner, considered with both Mrs. Michel and MrsHayes, picking the same other person, (Ms. Michel on two occassions), the lack of certainty at confrontation, the length of time between confrontation, the wrong physical description, and inconsistent descriptions, with both witnesses lack of attention, leads to the conclusion that a misidentification took place. *Marsden v. Moore* 847 F. 2d ___ (1988) cert. denied 488 U.S. 983.

The witnesses stated the man had short hair, petitioner had a long juri curl, petitioner had a shorter mustash, petitioner had chin hair, the suspect did not CT 147, 148, 140-141, her statement was only that petitioner looked like the person, except his hair was to long, his mustash was to long, and he had chin hair, the suspect did not. None of the clothes taken from petit- and his home were identified by the witnesses. The witness was shown a photo line-up in Oct. 1986, CT 50, on March 13, 1987, CT 139, another line-up in March 1987, where she picked someone else CT. 141, and a single photograph of petitioner later on CT 61.

Then on October 3, 1986, just a few days after the shooting, Ms. Michel's identification was uncertain and she stated hair to long, chin hair wasn't there, etc. and three photo line-ups later, she picked someone else, and then was shown a single photograph of petitioner. This repeated showing of photo's and then a single photograph to an uncertain witness, meets the standard of suggestiveness, petitioner is required to show under *U.S. v. Simmons* (1968) 390 U.S.377. See also *Gilbert v. California* (1967) 388 U.S. 263.

We have got to see here, that the court had to entertain the motion to exclude the identification testimony of both Mrs. Michel and Ms. Hayes under the *Biggers Supra* standards, and the suggestiveness standards of *Simmons Supra*.

Counsel was ineffective for his failure to investigate and adequately prepare and litigate a motion to suppress Mrs. Michel's identification and Ms. Hayes, as it was likely that he would have prevailed. *Tomlin v. Myers* 30 F. 3d 1235 (9th Cir. 1994).

Next we find that counsel failed to request a pre-trial line-up, especially where a misidentification had already occurred, i.e., two witnesses picked the same person from photo's that contained petitioner's, they were uncertain, and procedures were occuring that were likely to cause misidentification. *Evans v. Superior Court* (1974) 11 Cal. 3d 617, and it should have been conducted prior to preliminary hearing, based on the facts known to counsel, i.e., the inadequate descriptions, the multiple photo line-ups, the picking of other people, the single photo line-up, the victims uncertainy. In *People v. Rivera* (1981) 127 Ci 3d 136, 148 cert. denied 457 U.S. 1123 failure to conduct a line-up, resulted in a one on one line-up in court, where the witness had no independent recollection of the petitioner, and had been totally inconsistent on all identification attempts.

Counsel is bound by duty and law to zealously represent his client, using every legal means available to present a defense and protect his clients rights. *Sanders v. Ratelle* 21 F. 3d 1446 (9th Cir. 1994), here counsel even failed to consider a physical line-up, with several men

that are similar, and, using the record as a basis, would have resulted in the witnesses inability to pick out petitioner. Counsel failed again here.

Next, we must examine counsel's cross-examination of Mrs. Michel, on her identification. Even if he had failed to get her testimony excluded as to identification the jury had the right to know, and it was crucial they knew, that Mrs. Michel on two occassions, and Ms. Hayes, both identified a Thomas Rideau positively as the suspect in this case. CT 64, and the court ruled that identification was positive, and it was Thomas Rideau. CT 141-142.

However, the jury was never to hear about these extra-judicial and in court identifications of another person, as counsel failed to cross-examine either witness as to these prior identifications. Reviewing counsel's competency on this issue, the the court must assume the damaging potential of the cross-examination would have been realized fully by the jury. *U.S. v. Vargas* (9th Cir. 1991) 933 F. 2d 701, 709. Indeed, where two witnesses pick the same person, and the physical description they give, which is different than petitioner's, and thereby exculpatory evidence. *Government of Virginia Islands v. Mills* (3rd Cir. 1992) 956 F. 2d 443, 444 it is likely would have had a powerful effect on the jury.

Further evidence relevant to witnesses credibility, petitioner had a right for the jury to know *U.S. v. Brumel-Alvarez* 96 Dily Journal D.A.R. 13150 (9th Cir. Oct. 30, 1996), and that evidence would have underminded the prosecutions evidence. (i.e. the credibility of the identification), it thereby undermines the confidence in the outcome. *Kyles v. Whitely* 115 S. ct. 1555, 1566 (1995).

Further it was counsel's duty as competent counsel to impeach the key prosecution witness and the only crucial evidence against petitioner, and failure to do so, was ineffective assistance of counsel. *Foltz v. Blackburn* 56 LW 3641 (6th Cir. 9/17/87).

Also, counsel, in his failure to litigate the motion to suppress, could have brought to light the multiple photo line-ups, the witnesses uncertainy at each, the characteristics, i.e., hair, mustash, and chin hair, the inability to identify any of petitioner's clothes as those worn, and the single photo line-up, before the jury, to impeach the credibility of the identification, and the underhanded methods of the prosecution, who appears was willing to leave this evidence undisclosed to the jury. *Watkins v. Sowders* 449 U.S. 341 (1981); *U.S. v. Davenport 753 F. 2d 1460, 1462 (9th Cir. 1985), each indicate such inquiry is proper before a jury, in that the question of reliability is traditionally one for the jury. Watkins Supra* at 347.

Counsel, did none of this and the jury was unaware of this crucial evidene on reliablity, where fore, petitioner believes counsel was incompetent.

Last, we must consider counsel's failure to call alibi witnesses, this is crucial in that 1. co-defendant's testimony was insufficient to convict. Cal Penal Code Sc. 1111, 2. co-defendant was impeached by petitioner, Ms. Williams and Ms. Hkcerson, and in fact admited the robbery and owning the orange shirt, etc. 3. The identification was weak and likely a misidentification, 4. Heckerson corroborates Williams trial testimony that co-defendant is the only one who talked about a robbery and

petitioner was not within hearing distance, 5. Places petitioner somewhere else at the time of the crime, and corroborates his own testimony and that of Williams and Heckerson.

Counsel's failure to call petitioner's alibi witnesses that corroborate and exonerate petitioner is traditionally, ineffective assistance, and cannot be tactical. *U.S.v. De Banco* 780 F. 2d 81, 85 (D.C. Cir. 1986); *Thomas v. Lockhart* 738 F. 2d 304, 308 8th Cir. 1984) cert. denied 474 U.S.1073 (1986), or as put in *Chambers v. Armontrout* 885 F. 2d 1318 (8th Cir. 1989) citing *Strickland v. Washington* 466 U.S.668 (1984) at 694-95; *Sanders v. Trickey* 875 F. 2d 205, 208 (8th Cir. 1989) the standard of prejudice is a reasonable probability sufficient to undermine confidence in the outcome.

Wherefore, under the *Strickland Supra*, standard, there can be no finding otherwise, counsel's inadequate performance, his bumbling incompetence, and his failure to prepare, is overwhelming supported in the record, shows counsel's error's were sufficient to deny petitioner several meritorious defenses, any of which reasonably would have, if presented, undermined the outcome of the trial, and would potentially have exonerated this petitioner.

Therefore, petitioner believes that Habeas Corpus should issue, but not less than an evidentiary hearing where petitioner can question counsel, and the juror's exhibited in exhibits C and D. Counsel also put the wrong name in the Motion to Exclude Identification Evidence. Thomas Rideau photo was picked at preliminary hearing, not Steven Rockingham, by the victim's wife. She picked Rockingham's photo on another occassion.

Dated November 10, 1997

Respectfully submitted,

/s/ Tony E. Saffold
Tony E. Saffold,
Petitioner
In Propria Persona

Saffold E-62266

IN-COMING LEGAL – April '97-Nov. '97

April 22: D. Fry & Assoc. – P.I. Stockton
Schraer – Atty. – San Diego
15: Schraer – Atty. – San Diego
Schraer – Atty. – San Diego
14: D. Fry & Assoc. – Stockton

May 27: Superior Court – Stockton
22: Schraer – Atty. – San Diego
12: D. Fry & Assoc. – PI – Stockton
5: Superior Court – Stockton

June 24: Schraer – Atty. – San Diego
19: D. Fry & Assoc. – Stockton
12: Superior Court – Stockton
9: Schraer – Atty. – San Diego
6: Private Inv. – Stockton

July 23: Fry-Private Inv. – Stockton
3: Associates – Stockton

August 6: Schraer – Law – San Diego

September: None

October: None

November 17: Supreme Court – S.F.

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

AO 241 (Rev. 5/85)

United States District Court

District Eastern

Name Tony Eugene Saffold

Prisoner No. E-62266

Case No.

Place of Confinement
CSP-Solano P.O. Box 4000/6-220L
Vacaville, Ca. 95696-4000

CIV. S-98-1040
DFL JFM P

(Filed Jun. 4, 1998)

Name of Petitioner (include name under which convicted)	Name of Respondent (authorized person having custody of petitioner)
TONY EUGENE SAFFOLD	v. ANTHONY NEWLAND

The Attorney General of the State of: CALIFORNIA

PETITION

1. Name and location of court which entered the judgment of conviction under attack San Joaquin County Superior Court, in Stockton, Ca.

2. Date of judgment of conviction April 3, 1990

3. Length of sentence 30 years to life

4. Nature of offense involved (all counts) Murder robbery w/firearm; assault w/firearm & use of firearm. Penal Code sections 187; 211; 12022.5; and 245(a)(2).

5. What was your plea? (Check one)

   (a) Not guilty ##

   (b) Guilty __

   (c) Nolo contendere __

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

   _____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

   (a) Jury ##

   (b) Judge only __

7. Did you testify at the trial?

   Yes # No _

8. Did you appeal from the judgment of conviction?

   Yes # No _

9. If you did appeal answer the following:

   (a) Name of court Calif., Court of Appeal, Third Appellate District

   (b) Result Affirmed

   (c) Date of result and citation, if known January 27, 1993 3 Crim. C009223

   (d) Grounds raised Court gave erroneous jury instruction; Kell-Frye violation; sentencing error; and jury failed to reach unaminous decision on statutory law as to murder.

   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

   (1) Name of court

   (2) Result _____

   _____

   (3) Date of result and citation, if known ___

   (4) Grounds raised _____

   _____

   (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

   (1) Name of court _____

   (2) Result _____

   _____

   (3) Date or result and citation, if known ___

   (4) Grounds raised _____

   _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes # No _

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court San Joaquin County Superior Court

(2) Nature of proceeding Habeas corpus

(3) Grounds raised Trial counsel provided ineffective assistance of counsel. See accompanied memorandum of points and authorities.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes _ No #

(5) Result denied

(6) Date of result June 9, 1997

(b) As to any second petition, application or motion give the same information:

(1) Name of court Calif. Court of Appeal, Third Appellate District

(2) Nature of proceeding Habeas Corpus

(3) Grounds raised Same as above

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes _ No #

(5) Result denied

(6) Date of result June 26, 1997

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes # No _

(2) Second petition, etc. Yes _ No _

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Denial of effective assistance of counsel

Supporting FACTS (state *briefly* without citing cases or law) See, accompanied memorandum of points and authorities in support of petition for writ of habeas corpus.

B. Ground two: same as above

Supporting FACTS (state *briefly* without citing cases or law):

C. Ground three: same as above

Supporting FACTS (state *briefly* without citing cases or law):

D. Ground four: same as above

Supporting FACTS (state *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were *not* so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes _ No #

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Patricia Fergusion, Deputy Public Defender, County of San Joaquin, 24 S. Hunter St. Stockton, Ca. 95202

(b) At arraignment and plea Ralph Cingcon & co-counsel Michael Platt, 125 Bridge Pl Suite 201, Stockton, Ca. 95202

(c) At trial Same as latter of above

(d) At sentencing Same as above

(e) On appeal Kyle Gee, 2626 Harrison St. Oakland, Ca. 94612

(f) In any post-conviction proceeding Pro Se

(g) On appeal from any adverse ruling in a post-conviction proceeding Kyle Gee, 2626 Harrison St. Oakland, Ca. 94612

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes # No _

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes _ No #

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes _ No _

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 2, 1998.
(date)

/s/ Tony E. Saffold
Signature of Petitioner

TONY EUGENE SAFFOLD
CSP SOLANO / E-62266
P.O. BOX 4000 / 6-220L
VACAVILLE, CA. 95696-4000

Petitioner In Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD, Petitioner,	)	Case No. _____ (Sup. Ct. No. SC40118A)
v.	)	PETITIONER'S
ANTHONY NEWLAND, Respondent.	)	DECLARATION: IN REFERENCE TO THE DATES IN WHICH HE HANDED OVER HIS PETITIONS TO PRISON OFFICIALS FOR MAILING AND THE DATES IN WHICH HE RECEIVED RESPONSES FROM THE COURTS ON HIS SAID PETITIONS

DECLARATION

I, Tony Eugene Saffold, declare under the penalty of perjury as follows:

1. I am the petitioner in this action.

2. On April 17, 1997, I placed my petition for writ of habeas corpus in the possession of prison guards for mailing distribution to the San Joaquin County Superior

Court. However, the court's record reflect that my application for habeas corpus relief was not filed until May 1, 1997.

3. On June 9, 1997, the San Joaquin County Superior Court denied my habeas relief. On June 14, 1997, I received this denial from prison officials (guards).

4. On June 15, I placed my petition for habeas corpus relief in the possession of prison guards for mailing distribution to the California Appellate Court, Third Appellate district. The petition was filed by that court on June 18, 1997.

5. On June 26, 1997, the California Court of Appeal, Third Appellate district denied my habeas relief. However, I was never informed of this denial from any prison officials. I was never issued any legal mail with respect to the court's denail.

6. I have been unsuccessfully trying to obtain a copy of the prison's record on the legal mail delivery to inmates.

7. In November 1997, I wrote the California Court of Appeal, Third Appellate District expressing concern as to the status of my pending petition. It was at that time when I discovered that my petition had been denied by that court on June 26, 1997.

8. It was on November 10, 1997, that I received from the California Appellate court the information and a copy of its denial of my petition.

9. On November 10, 1997. I placed my petition for writ of habeas corpus in the possession of a prison guard to be mailed to the California Supreme Court.

10. On June 2, 1998, I received via prison delivery of inmate legal mail the denial of my petition to the State Supreme Court.

11. On June 2, 1998, I placed my petition for writ of habeas corpus in possession of a prison guard for mailing to the United states district court.

I, the undersigned, say: I am the petitioner in this action. I declare under the penalty of perjury that the foregoing is true and correct and from my own knowledge. Executed on June 2, 1998, 3 at California State prison, in Vacaville, Ca. 95696-4000

TONY EUGENE SAFFOLD
Petitioner In Pro Se

TONY EUGENE SAFFOLD
E-62266
CSP-SOLANO
P.O. BOX 4000
VACAVILLE, CA. 95696-4000

Petitioner In pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,
Petitioner,
v.
ANTHONY NEWLAND,
Respondent.
_____/

No. CIV S-98-1040 DFL JFM P

AMENDED DECLARATION OF TONY EUGENE SAFFOLD

AMENDED DECLARATION

I, Tony Eugene Saffold, am the petitioner in this action. I declare under the penalty of perjury as follows:

(1) On April 17, 1997, I placed my petition for writ of habeas corpus in prison authorities possession to be forwarded to the Superior Court of San Joaquin County.

(2) On June 14, 1997, I placed my petition for writ of habeas corpus in the possession of prison authorities to be forward to the California Court of Appeal, Third Appellate District.

(3) On November 10, 1997, I placed my petition for writ of habeas corpus in the possession of prison authorities to be forwarded to the California Supreme Court.

(4) On June 2, 1998, I placed my petition for writ of habeas corpus in the possession of prison authorities to be forwarded to the United States District Court – Eastern District for California.

(5) I did not receive the California Court of Appeal – Third Appeal District judgment denying my application for habeas corpus relief until November 10, 1997, when I wrote that court then I was sent the denial of the petition.

In sum, I handed over my petitions to prison authorities on the above stated dates. And I did not receive the California Court of Appeal – Third Appellate District order / judgment denying my petition until November 10, 1997.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on November 24, 1998, at CSP-Solano, in Vacaville, Ca.

/s/ Tony Eugene Saffold
TONY EUGENE SAFFOLD
Petitioner In Pro Se

TONY EUGENE SAFFOLD
E-62266
CSP-SOLANO
P.O. BOX 4000
VACAVILLE, CA. 95696-4000

Petitioner In Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,

Petitioner,

v.

ANTHONY NEWLAND,

Respondent.

_____/

Case No.
CIV S-98-1040
DFL JFM P

(Filed Sep. 21, 1998)

RESPONSE TO RESPONDENT'S MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

* * *

a. In The Instant Case The State Created An Impediment In Violation Of The Constitution Or Laws Of The United States That Prevented Petitioner From Filing His Application

In this case an impediment was created by State action in violation of the Constitution or laws of the United States which prevented Petitioner from filing his

application. 28 U.S.C. §2244(d). On June 14, 1997,[2] Petitioner filed a petition for writ of habeas corpus with the California Court of Appeal, Third Appellate District, in case number CO26811. Respondent's Motion to Dismiss; Exh. F. Respondent assert that the petition to the State Appellate Court was denied on June 26, 1997. Respondent's Motion to Dismiss at 4. However, Petitioner was not put on notice that the California Court of Appeal, Third Appellate District had denied his application for habeas corpus relief until November 10, 1997. This fact was not discovered until Petitioner Wrote the California Court of Appeal, Third Appellate District inquiring as to the status of his pending habeas petition. *See* Attachment A. and B. After filing the instant application for writ of habeas corpus in this Court Petitioner diligently attempted to obtain from the prison a copy of the record – which is recorded by the inmate signing for all incoming legal mail. However, his attempts were to no avail. Petitioner went to the extent of filing an INMATE/PAROLE APPEAL FORM. However, the prison authorities refused to provide

* * *

limitation period for a petition for writ of habeas corpus by a state prison er pursuant to the non-capital judgment of a state court. Section 2244(d)(1) provides in part:

> (D)(1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the

---

[2] Under the mailbox rule the habeas petition was filed on June 14, 1997, and not June 18, 1997, as respondent assert. This issue will be further discussed herein below.

judgment of a State court. The limitation period shall run from the latest of –

(D) the date on which the factual predicate of the claim or cliams presented could have been discovered through the exercise of due diligence.

In the instant case there are factual predicates of the claims presented which the exercise of due diligence were discovered on May 8, 1997. *See* Petition for writ of habeas corpus: Appendix A.

In this case, Petitioner presented a particular claim, i.e., ineffective assistance of trial counsel for failing to impeach the prosecution's key witness. Petition at 18. In order for Petitioner to develop the factual predicate of the ineffective assistance of counsel claim it was imperative that he meet his burden in establishing prejudice thereof. The declarations and statements from the jurors at (Petition; App. A) was necessary in order for Petitioner to establish the prejudice prong on ineffective assistance of trial counsel.

To prevail on a Sixth Amendment claim the defendant "must show both that counsel's representation fell below an objective standard of reasonableness, and that there exist a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). Thus, the discovery of evidence to establish the prejudice prong is a factual predicate of a claim. Here, that evidence derived from the jurors statements with respect to whether or not it would have raised doubt in their minds and undermined the prosecution's case

had they known the prosecution's key witness had identified two other guys on two separate occasions as the culprits. Without this information from the jurors it would have been next to impossible for Petitioner to establish his burden of showing that he was prejudiced by trial counsel's ineffectiveness.

Petitioner submits he had no way of knowing how to contact the jurors, in fact, his trying to contact them on his own might have very well been a violation of law. In any event, he had no knowledge whatsoever as to full names, addresses and phone numbers, or work place. In addition, he was not financially able to hire a private investigator to seek this information out and make contact with the jurors and try to elicit information in the form of statements which might have been important to his claim. When Petitioner's family members were finally able to hire a private investigator for him he did not know what to expect. Whether the jurors would discuss the matter at all? Whether it would have raised doubt in their minds had they known the prosecution's key witness had identified two other guys on two separate occasions as the – culprits of the murder and robber? However, Petitioner knew in order for to establish that he was prejudiced by his trial counsel's ineffectiveness he had to seek this information from the jurors.

Petitioner contends the date on which the factual predicate of the claim presented could have been discovered through the exercise of due diligence is February 1997. This the date his family retained Audrey M. Frey (Private Investigator) to attempt to locate the jurors who served at his trial. Petition: App. A. Whereas, Mrs.

Audrey M. Fry located several of the jurors and asked specific series of questions. Id.

As is illustrated above the statements from the jurors constitute a factual predicate of the ineffective assistance of counsel claim presented in his habeas petition to this Court. Likewise, February 1997 is the date on which the factual predicate of the claim presented could have been discovered through the exercise of due diligence. Petitioner incorporates by reference his claim on ineffective assistance of counsel at (Petition at 18-36; and App. A) to support his position here.

Pursuant to §2244(d)(1), (D) Petitioner's 1-year period of limitation did not commence until February 1997, which means he had until February 1998 to file his habeas petition with this Court. Thus, pursuant to the equitable tolling provision of 28 U.S.C. §2244(D)(2), the time during which a properly filed application for State post-conviction or other collateral review with respect to pertinent judgment or claim is pending shall not be counted toward any period of limitation. Therefore, the time with which Petitioner's habeas petition was pending with the state courts, i.e., superior court, court of appeal, and Supreme Court shall not be counted toward any period of limitation. Accordingly, Petitioner's habeas corpus petition filed with this Court on June 4, 1998, should not be dismissed as untimely. Thus, Respondent's motion to dismiss should be denied.

III

PETITIONER HAS EXHAUSTED HIS STATE REMEDIES WITH RESPECT TO HIS HABEAS CORPUS CLAIMS RAISED BEFORE THIS COURT, EXCEPT HIS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WAS NOT DISPOSED OF BY THE HIGHEST STATE COURT

Petitioner submits that his ineffective assistance of appellate counsel claim (memorandum of points and authorities in support of petition for writ of habeas corpus at page 60; claim V). Respondent's assertion that Petitioner has not provided the highest state court an opportunity to rule on the "merits of each of his claims" (Respondent's Motion to Dismiss at 10) is unsupported by the record. As is shown at (Respondent's Motion to Dismiss: Exh. G), Petitioner provided the highest state court an opportunity to rule on the merits of each of his claims before this Court, except the ineffective assistance of appellate counsel claim. Thus, except for the ineffective assistance of appellate counsel claim all of Petitioner's claims are properly exhausted.

Instead of dismissing his habeas petition Petitioner moves this Court to dismiss only the ineffective assistance of appellate counsel claim. Thereby, the issues contained in his habeas petition are properly exhausted.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

Saffold
v.
Newland

CASE NUMBER: CIV S-98-1040 DFL JFM P
(Filed Jan. 6, 1999)

XX – **Decision by the Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JANUARY 6, 1999.

Jack L. Wagner,
Clerk of the Court

ENTERED: January 6, 1999

by: /s/ G Miyasato
G Miyasato, Deputy Clerk

TONY EUGENE SAFFOLD
E-62266
CSP-SOLANO
P.O. BOX 4000
VACAVILLE, CA. 95696-4000

Petitioner In Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,
Petitioner-Appellant.
v.
ANTHONY NEWLAND,
Respondent-Appellee.
_____/

Case No. CIV S-98-1040 DFL JFM P

NOTICE OF APPEAL
(Filed Jan. 14, 1999)

Notice is hereby given that Petitioner-Appellant Tony Eugene Saffold, in pro se, in the above named case, appeals to the United States Court of Appeals for the Ninth Circuit from the final order/judgment entered in this action on January 6, 1999, granting respondent's motion to dismiss petition for writ of habeas corpus, as untimely pursuant to 28 U.S.C. §2244(d).

Date: January 12, 1999

Respectfully submitted,

/s/ Tony Eugene Saffold
TONY EUGENE SAFFOLD
Petitioner-Appellant In Pro Se

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Supreme Court, U.S.
FILED
NOV 28 2001
OFFICE OF THE CLERK

No. 01-301

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY NEWLAND, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
JO GRAVES
Senior Assistant Attorney General
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Counsel for Petitioner

43 pp

QUESTION PRESENTED

Whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. § 2244(d)(2), the Antiterrorism and Effective Death Penalty Act's tolling provision.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-301

ANTHONY NEWLAND, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Saffold v. Newland* (hereafter "*Saffold*") and the order denying the petition for rehearing and suggestion for rehearing en banc are reported at 250 F.3d 1262 (9th Cir. 2001) and are reprinted in Appendix A to the Petition for Writ of Certiorari. *Saffold* amended and superceded the Ninth Circuit's July 17, 2000, opinion reported at 224 F.3d 1087 (9th Cir. 2000), which is reprinted in Appendix B to the Petition for Writ of Certiorari. The district court's February 25, 1999, order granting a certificate of appealability is reprinted in Appendix D to the Petition for Writ of Certiorari. The district court's January 6, 1999, order adopting the findings and recommendations of the magistrate judge is reprinted in Appendix E to the Petition for Writ of Certiorari, and the November 3, 1998, findings and recommendations of the magistrate judge are reprinted in Appendix F to the Petition for Writ of Certiorari.

JURISDICTION

On May 23, 2001, the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") entered its judgment in *Saffold* and denied rehearing and rehearing en banc. On August 20, 2001, Anthony Newland filed a petition for writ of certiorari in this Court, and certiorari was granted on October 15, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2244(d) sets forth the following one-year statute of limitations period and tolling provision for an application for a writ of habeas corpus by a state prisoner held in custody pursuant to the non-capital judgment of a state court:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2263 sets forth the following time requirements and tolling rules for death-penalty cases:

> (a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.
>
> (b) The time requirements established by subsection (a) shall be tolled–
>
> (1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;
>
> (2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and
>
> (3) during an additional period not to exceed 30 days, if –
>
> (A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas

corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

STATEMENT OF THE CASE

On April 3, 1990, Respondent was found guilty in California state court of murder, assault with a deadly weapon, two counts of robbery, and findings of firearm use associated with the murder and robberies. His conviction became final on April 20, 1992.

On April 17, 1997, seven days before the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) one-year statute of limitations would have expired,[1] Respondent filed his first state petition for writ of habeas corpus with the San Joaquin County Superior Court by delivering the petition to prison authorities.[2] The petition was denied by the San Joaquin County Superior Court on June 9, 1997.

On June 14, 1997, Respondent delivered a petition for writ of habeas corpus to prison authorities to be filed with the California Court of Appeal, Third Appellate District. The petition was filed on June 17, 1997, and denied by the Third Appellate District on June 26, 1997.

---

1. In *Patterson v. Stewart*, 251 F.3d 1243, 1245-1246 (9th Cir. 2001), the Ninth Circuit joined all other circuits which have considered the issue and held that "AEDPA's one-year grace period for challenging convictions finalized before AEDPA's enactment date is governed by Rule 6(a) and ended on April 24, 1997 in the absence of statutory tolling."

2. Petitioner does not contest *Saffold*'s holding that the mailbox rule set forth by this Court in *Houston v. Lack*, 487 U.S. 266, 276 (1988), applies to habeas petitions filed under the AEDPA and applies, "for purposes of calculating the AEDPA limitation period, to the filing of Saffold's petition to state court that began the period of tolling." *Saffold*, 250 F.3d at 1268.

On November 13, 1997, after waiting over four and one-half months, Respondent filed a petition for writ of habeas corpus with the California Supreme Court, which denied the petition on May 27, 1998, "on the merits and for lack of diligence." (Pet. App. G.)

On June 4, 1998, Respondent filed an application for writ of habeas corpus in the United States District Court, Eastern District of California (Sacramento). The district court's jurisdiction was conferred by 28 U.S.C. § 2254.

On August 28, 1998, Petitioner filed a motion to dismiss on the ground that Respondent's application for writ of habeas corpus was barred by the statute of limitations set forth in 28 U.S.C. § 2244(d).

On November 3, 1998, the magistrate judge filed his findings and recommendations that Petitioner's motion to dismiss be granted and that the case be closed. (Pet. App. F.)

On January 6, 1999, the district court adopted the findings and recommendations in full, granted Petitioner's motion to dismiss and ordered the case dismissed. (Pet. App. E.)

On February 25, 1999, the district court granted a certificate of appealability limited to the issue of whether Respondent's "application is barred by the statute of limitations contained in 28 U.S.C. § 2244(d)(1)." (Pet. App. D.)

On July 17, 2000, the Ninth Circuit filed *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000) reversing the district court's dismissal of the case. (Pet. App. B.)

On July 31, 2000, Petitioner filed a petition for rehearing and suggestion for rehearing en banc.

On May 23, 2001, the Ninth Circuit filed an order denying the petition for rehearing and suggestion for rehearing en banc, and filed *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001), which amended and superceded the July 17, 2000, opinion. (Pet. App. A.)

On June 4, 2001, the Ninth Circuit filed an order granting Petitioner's motion for stay of mandate. (Pet. App. C.)

On August 20, 2001, Petitioner Anthony Newland's petition for writ of certiorari was filed with this Court.

On October 15, 2001, this Court granted certiorari.

SUMMARY OF ARGUMENT

Seven days before the one-year AEDPA statute of limitations period ended and five years after his state court direct appeal became final, Respondent filed his first state habeas corpus petition in superior court alleging ineffective assistance of counsel. After the state appellate court summarily denied his second state petition for habeas corpus alleging ineffective assistance of counsel, Respondent waited over four and a half months before he filed his ineffective assistance claim with the California Supreme Court, which denied the petition "on the merits and for lack of diligence."

Although the California Supreme Court's finding of "lack of diligence" established that Respondent failed to properly pursue his state collateral remedies under California law, the question remaining to be answered in the instant case is whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. § 2244(d)(2), AEDPA's tolling provision.

In reversing the district court's dismissal of Respondent's federal application for writ of habeas corpus as untimely under AEDPA's statute of limitations, *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001) established an indefinite tolling rule that was later confirmed in *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001). *Saffold's* indefinite tolling rule provides that, if the California Supreme Court addresses a petition for writ of habeas corpus on the merits, AEDPA's statute of limitations period is tolled from the filing of the state petition in the trial court until the state supreme court's denial of the habeas petition, including all gaps between the filing of

the state petitions. As explained in *Welch*, "*Saffold* turned, not on the length of the time gap between petitions, but on the fact that the California Supreme Court had addressed Saffold's petition on the merits." *Id.* at 1016.

Saffold's indefinite tolling rule must be reversed because it is inconsistent with congressional "intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001). As noted by the Seventh Circuit in *Fernandez v. Sternes*, 227 F.3d 977, 980 (7th Cir. 2000), *Saffold's* "understanding of § 2244(d)(2) would sap the federal statute of limitations of much of its effect" because under *Saffold*, "if a prisoner let ten years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under § 2244(d)(2) as long as the state court denied the belated request on the merits."

Statutory interpretation of the meaning of "pending" in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), establishes that *Saffold's* indefinite tolling rule is contrary to congressional intent and that it undermines the policy judgments made by Congress when it enacted AEDPA's statute of limitations. Such analysis supports the conclusion that Congress intended to adopt the "ordinary or natural" meaning of the word "pending" ("remaining undecided"; "awaiting decision"; "not yet decided") rather than a more expansive definition that would support *Saffold's* indefinite tolling rule. Congress did not intend to allow tolling during the gaps between the rendering of a decision on a habeas corpus application and the filing of petitions for review, appeals or additional original petitions in the course of exhausting state collateral claims because to do so would promote delay on the part of the petitioner by permitting tolling for gaps between levels of state review that happen to be permissible under state procedural laws or rules. Such state procedural laws and rules cannot be allowed to define the acceptable time frame for the

federal statute of limitations. Congress specifically provided for a defined time period which is intended to provide an incentive for diligent behavior on the part of the petitioner. To allow additional tolling based upon time periods permitted under state law would open the door for state procedural laws and rules to in effect trump the federal statute of limitations.

Statutory interpretation of the meaning of "pending" set forth in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), also supports the conclusion that the line of circuit court cases providing for tolling during the gaps between tiers of state collateral review also have improperly expanded tolling beyond the intent of Congress, although to a lesser degree than *Saffold*. The circuit courts have ignored or discounted the legislative history and statutory language which strongly supports the conclusion that Congress intended to adopt the ordinary or natural meaning of the word pending and did not intend to allow tolling during the gaps between the rendering of a decision and the filing of petitions for review, appeals or additional original petitions in the course of exhausting state collateral claims. Furthermore, the circuit court decisions have created confusion because they are in conflict with each other, and their rejection of the view that the time between a state court's decision denying an application for habeas corpus relief and a subsequent properly filed application for state habeas corpus relief does not toll the statute of limitations (hereafter the "gap theory") has created the potential for widely divergent grants of tolling due to the diversity of state procedural rules and statutes.

This Court should resolve the conflict over the meaning of "pending" in AEDPA's tolling provision 28 U.S.C. § 2244(d)(2), by establishing a uniform national rule that accurately reflects congressional intent. Petitioner submits that the gap theory most accurately reflects the intent of Congress. By recognizing that the gap theory most accurately represents congressional intent to toll the statute of limitations only when properly filed applications are pending before a state court and not during the period following decision at one level and the

filing of an application for review at another level, this Court can prevent the lower federal courts from diluting Congress's power to define the proper scope of the writ of habeas corpus and can provide a uniform national rule that reflects the intent of Congress.

ARGUMENT

I.

SAFFOLD MUST BE REVERSED BECAUSE IT IS INCONSISTENT WITH CONGRESSIONAL INTENT AND CANNOT BE RECONCILED WITH THE POLICY CONSIDERATIONS SUPPORTING AEDPA'S STATUTE OF LIMITATIONS

A. *Saffold's* Indefinite Tolling Rule

Five years after his state court direct appeal became final, and seven days before the one-year AEDPA statute of limitations period expired, Respondent filed his first state habeas corpus petition in superior court (alleging ineffective assistance of counsel). Five days after the superior court denied his petition on the merits, Respondent filed the identical petition with the state appellate court by delivering the petition to prison authorities. Following a summary denial of the petition by the state appellate court, Respondent waited over four and a half months before he filed his ineffective assistance claim with the California Supreme Court, which denied the petition "on the merits and for lack of diligence."

After Respondent's federal application for writ of habeas corpus was dismissed as untimely under AEDPA's statute of limitations, the Ninth Circuit reversed the district court and held that, when a California Supreme Court ruling

dismissing a habeas corpus petition for untimeliness alternatively addresses the merits, AEDPA's statute of limitations period is tolled from the filing of the state petition in the trial court until the California Supreme Court's denial of the habeas petition, including gaps between the filing of the petitions. Pet. App. A at 8-13; *Saffold*, 250 F.3d at 1265-1268; Pet. App. B at 6-10; 224 F.3d at 1088-1091.

Although the California Supreme Court's finding of "lack of diligence" established that Respondent failed to properly pursue his state collateral remedies under California law, the question remaining to be answered in the instant case is whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. § 2244(d)(2), AEDPA's tolling provision. After recognizing the California Supreme Court's finding of Respondent's "lack of diligence," the majority opinion in *Saffold* expressed its concern that the California Supreme Court's

> order wholly fails to specify, either by additional explanation or citation to authority, whether the delay to which it refers is the four and one-half months from the decision of the Court of Appeal to the filing of Saffold's petition in the California Supreme Court, or the five years from the finality of Saffold's conviction to his first habeas petition.

Pet. App. A at 11-12; *Saffold*, 250 F.3d at 1267; Pet. App. B at 9-10; 224 F.3d at 1090.

Judge O'Scannlain's dissenting opinion in *Saffold* argued that, "[i]n a case involving such dilatory behavior as this, . . . the clock must continue to run in the periods of excessive delay between the three separate habeas petitions." Pet. App. A at 15; *Saffold*, 250 F.3d at 1269; Pet. App. B at 12-13; 224 F.3d at 1091-1092. Judge O'Scannlain explained that:

Under any method of review, Saffold's delay falls substantially outside the period that *Nino*[3] tolls for "properly pursu[ed]" state post-conviction remedies. 183 F.3d 1006. The majority ignores the California Supreme Court's dismissal, stating that it should have justified its decision by providing "additional explanation or citation to authority." Maj. Op. at 6523. I cannot participate in the majority's attempt to tell the California Supreme Court how to deal with dilatory petitions. Saffold had obviously dallied months longer than the time allotted under California rules. Regrettably, the majority presumptuously and inappropriately purports to trump the procedural rules of the highest court of a sovereign state. By overlooking Saffold's delay in this case, the majority eviscerates the language in the fourth footnote of the *Nino* decision. What, if not a case such as this, pray tell, would satisfy the majority that a petitioner had violated *Nino*?[4]

Pet. App. A at 17; *Saffold*, 250 F.3d at 1270; Pet. App. B at 14; 224 F.3d at 1092.

---

3. *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000).

4. Although Petitioner agrees with Judge O'Scannlain that AEDPA's tolling provision does not apply to "periods of excessive delay between the three separate habeas petitions," Petitioner submits that the interpretation of AEDPA's tolling provision that most accurately reflects congressional intent would deny tolling for any delay between filings that can be attributed to the habeas corpus petitioner. As discussed, *infra*, statutory interpretation of the meaning of "pending" in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), establishes that Congress intended to adopt the "ordinary or natural" meaning of the word "pending" ("remaining undecided"; "awaiting decision"; "not yet decided") rather than a more expansive definition that would support *Saffold's* indefinite tolling rule or *Nino's* rejection of the gap theory.

Although the *Nino* court held "that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge" (*id.* at 1006), the *Nino* court qualified the holding by concluding "that, for purposes of § 2244(d), the time must be tolled for the entire period in which a petitioner is **appropriately pursuing** and exhausting his state remedies." *Id.* at 1004, emphasis added. The *Nino* court explained that:

> Because the statute of limitations was tolled during the period in which Nino was **properly pursuing** his state post-conviction remedies, the district court erred in dismissing Nino's federal habeas petition as untimely. . . . On March 11, 1997, the Los Angeles Superior Court denied Nino's first petition. On April 23, 1997, he filed a habeas petition in the California Court of Appeals [sic]; that petition was denied on May 1, 1997. On May 20, 1997, he filed a petition with the California Supreme Court, which was denied on August 27, 1997. Because he was **properly pursuing** his state collateral remedies,[FN4] AEDPA's statute of limitations was tolled until the California Supreme Court denied his petition for review of the court of appeals' [sic] denial of his habeas petition.

Id. at 1006-1007, emphasis added. In footnote 4, the *Nino* court noted that:

> [W]e express no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims. *See In re Robbins*, 959 P.2d 311, 317-18 (Cal.1998); *In re*

> *Clark*, 855 P.2d 729, 745 (Cal.1993). . . .

Nino at 1006, fn. 4.

By eviscerating footnote 4 of *Nino* (thereby eliminating *Nino's* requirement that a petitioner be "**appropriately pursuing** and exhausting his state remedies" in order to be allowed tolling under AEDPA), the majority opinion in *Saffold* has improperly diluted the statute of limitations imposed by Congress by interpreting AEDPA's tolling provision in a way that is inconsistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001). In short, *Saffold* allows tolling for any length of time despite a petitioner's dilatory behavior and a state court rejection of the petition on the ground of delay as long as the state court also addresses the merits of the claim. Pet. App. A at 11-13; *Saffold*, 250 F.3d at 1267-1268; Pet. App. B at 9-10; 224 F.3d at 1090.

Saffold's expansion of tolling to include such lengthy dilatory behavior has resulted in a circuit conflict between the Ninth Circuit and the Fifth, Seventh and Tenth Circuits over the question of whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. § 2244(d)(2), AEDPA's tolling provision.[5]

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5. In addition to the conflict between *Saffold* and the aforementioned circuits, a conflict also exists among the circuits that have rejected the gap theory, and those circuits have left a number of unresolved issues posed by widely divergent state procedural rules which will be discussed *infra* in Argument II. *See, e.g., Nara v. Frank*, 264 F.3d 310, 314-319 (3d Cir. 2001); *Melancon v. Kaylo*, 259 F.3d at 405-407; *Gibson v. Klinger*, 232 F.3d at 803-807; *Fernandez v. Sternes*, 227 F.3d 977, 978-981 (7th Cir. 2000); *Swartz v. Meyers*, 204 F.3d 417, 420-424 (3d Cir. 2000); *Peterson v. Gammon*, 200 F.3d 1202, 1203-1205 (8th Cir. 2000); *Bennett v. Artuz*, 199 F.3d 116, 119-120 (2d Cir. 1999), *aff'd on other grounds*, 531

The majority opinion in *Saffold* has been severely criticized by the Seventh Circuit's opinion in *Fernandez v. Sternes*, 227 F.3d 977. The *Fernandez* court stated that:

> The ninth circuit did not explain [in *Saffold*] how time during which no collateral attack is pending in state court may be deemed time "during which a properly filed application for State . . . collateral review . . . is pending"; *Saffold* does not analyze the language of § 2244(d)(2) . . . . All the majority said for itself is that *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), supported its conclusion. But *Nino* presents a different issue: is time following an appellate court's decision, and preceding a timely application for discretionary review, excluded from the calculation under § 2244(d)(2)? *Nino*'s affirmative answer, with which we agree [citations omitted], does not establish that an untimely request receives the same treatment. It is sensible to say that a petition continues to be "pending" during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was "pending" in the interim. Under the majority's approach in *Saffold*, if a prisoner let ten

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U.S. 4 (2000); *Mills v. Norris*, 187 F.3d 881, 882-884 (8th Cir. 1999); *Taylor v. Lee*, 186 F.3d 557, 560-561 (4th Cir. 1999), *cert. denied*, 528 U.S. 1197 (2000); *Nino v. Galaza*, 183 F.3d at 1004-1007; *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999). In Argument II, *infra*, Petitioner requests that this Court resolve the circuit conflict over the meaning of "pending" set forth in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), by establishing a uniform national rule that accurately reflects congressional intent.

> years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under § 2244(d)(2) as long as the state court denied the belated request on the merits. That implausible understanding of § 2244(d)(2) would sap the federal statute of limitations of much of its effect.
>
> *Saffold*'s approach also would give § 2244(d)(2) a Cheshire-cat like quality, both there and not there at the same time. . . . *Saffold* implements a make-believe approach, under which petitions were *continuously* pending whenever a state court allows an untimely filing. We prefer reality. An untimely petition is just that; it is filed when it is filed, and it was not "pending" long before its filing. We decline to follow *Saffold*. (Because this decision creates a conflict among the circuits, it was circulated before release to all judges in active service. See Circuit Rule 40(e). No judge requested a hearing en banc.)

227 F.3d at 980-981, italics in original; *accord*, *Melancon v. Kaylo*, 259 F.3d at 407 [rejecting *Saffold* and agreeing with the concern expressed by the Seventh and Tenth Circuits in *Fernandez* and *Gibson* "over the potential for indefinite tolling."].

Resolution of the issue presented in this case (whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. § 2244(d)(2)) is a matter of federal law. *Gibson v. Klinger*, 232 F.3d at 806; *Mills v. Norris*, 187 F.3d at 883; *Barnett v. Lemaster*, 167 F.3d at 1323. Although the federal courts may be guided by state procedural law in determining the meaning of "pending" under federal law, Petitioner submits that the determination does not depend on the nature of the state law ruling in the case or even in the final analysis on the actual state procedural rule or statute. For example, federal courts have held that AEDPA's one-year

statute of limitations is not trumped by a state's more generous statute of limitations. *Tinker v. Moore*, 255 F.3d 1331, 1334-1335 (11th Cir. 2001); *Painter v. Iowa*, 247 F.3d 1255, 1256 (8th Cir. 2001) [affirming dismissal of federal petition as time barred under AEDPA's statute of limitations and rejecting argument by defendant that § 2244(d)(2) should be construed "to toll the statute of limitations during the entire three years allowed under Iowa law to apply for post-conviction relief because exhaustion of state remedies is a prerequisite for federal habeas relief and because principles of comity so demand."].

In *Tinker*, the Eleventh Circuit rejected the argument that AEDPA's statute of limitations forced the defendant to choose between exercising his right to meaningful access to the state courts under Florida's two-year limitation period and his right to petition for federal habeas relief. The *Tinker* court explained that:

> [W]e reject Tinker's "impermissible choice" argument. By virtue of statute, Tinker is provided both a state and federal forum in which to seek post-conviction relief. Despite his argument to the contrary, he need not forego his state remedy entirely in order to avail himself of the federal remedy. However, he must exercise it within one year of the date his judgment became final and do so in a manner that leaves him sufficient time to timely file his federal petition.

255 F.3d at 1334-1335.

Petitioner submits that the *Saffold* opinion is fundamentally flawed because of its misguided focus on "deference" to the California Supreme Court's decision to address the merits and because it refuses to address the fact that resolution of the meaning of "pending" under AEDPA's statute of limitations involves a question of federal law (determining the intent of Congress) rather than the application of procedural

bar case law (to determine whether federal courts should give deference to state procedural bars that may or may not be grounded on an independent and adequate state ground). As noted in *Tinker*, state prisoners, by statute, are "provided both a state and federal forum in which to seek post-conviction relief." 255 F.3d at 1334. The mere fact that a state is willing to entertain habeas corpus claims well beyond AEDPA's one-year statute of limitations (by way of its own more generous statute of limitations or by way of a state court's willingness to entertain a claim on the merits despite inordinate delay) should not be allowed to trump congressional intent to "encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d at 807; *Melancon v. Kaylo*, 259 F.3d at 407; *see Tinker v. Moore*, 255 F.3d at 1334-1335; *Painter v. Iowa*, 247 F.3d at 1256.

For example, if the state of California decided to enact a statute of limitations which provided that state prisoners had two years within which to file an original petition in the appellate court following a superior court denial of a prior petition and another two years to file an original petition in the state supreme court following denial by the state appellate court, surely federal courts should not allow such a state statute to effectively override congressional intent by ruling that AEDPA's one-year statute of limitations must be tolled for an additional four years out of deference to the state statute of limitations. The fact that AEDPA's federal statute of limitations might require state prisoners to raise their state claims earlier than they would be required to file under state law does not deprive them of either their state or federal remedy. If a state prisoner wishes to exercise both his state and federal remedies, he must exercise his state remedy within one year of the date his judgment became final (plus congressionally sanctioned tolling) and do so in a manner that leaves him sufficient time to timely file his federal petition. 255 F.3d at 1334-1335.

Saffold's interpretation of AEDPA's tolling provision has effectively eviscerated AEDPA's statute of limitations by allowing indefinite tolling as long as a state court addresses the merits. The *Fernandez* court correctly stated that "[u]nder the majority's approach in *Saffold*, if a prisoner let ten years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under § 2244(d)(2) as long as the state court denied the belated request on the merits." 227 F.3d at 980; *accord*, *Melancon v. Kaylo*, 259 F.3d at 406-407 [rejecting *Saffold* and agreeing with the concern expressed by the Seventh and Tenth Circuits in *Fernandez* and *Gibson* "over the potential for indefinite tolling."]. As explained by the court in *Romero v. Roe*, 130 F.Supp.2d 1148 (C.D. Cal. 2001), the *Saffold* decision was not based on

> temporal considerations. Rather, what made the four-month delay inconsequential was the fact that the state court decided, at least in part, the tardily-filed petition on the merits. . . . It was not the particular length of the delay that was crucial to the court's decision, but rather how the state court treated the tardily-filed petition.

130 F.Supp.2d at 1150.

The view that *Saffold* permits indefinite tolling has recently been confirmed by the Ninth Circuit in *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001). In *Welch*, the district court dismissed a state prisoner's federal habeas petition for failing to satisfy AEDPA's one-year statute of limitations because he waited almost four and a half years after the state superior court's March 17, 1994, denial of his first state petition before he filed an original petition on different grounds in the California Supreme Court on August 22, 1998. In *Welch*, the Ninth Circuit stated that "[o]ur decision in *Saffold* turned, not on the length of the time gap between petitions, but on the fact that the California Supreme Court had addressed Saffold's

petition on the merits." *Id.* at 1016. The *Welch* court then explained that Welch's four and one-half year delay in filing did not defeat tolling under AEDPA because under the controlling authority of *Saffold* "the California Supreme Court's order denying Welch relief without comment or citation constituted a denial on the merits." *Id.* at 1017.

In a concurring opinion, Judge Gould stated that he was "concerned that the application of the rule of *Saffold* here operates substantially to frustrate the intent of Congress in imposing a one-year limitations period for state prisoners filing federal petitions for habeas corpus in AEDPA." *Id.* at 1018. He further stated that "*Saffold* leaves us" with the problem "that there is in effect no time limit whatsoever on state court proceedings" and that *Saffold* provides "no apparent way to resolve it." *Id.* at 1018-1019.

B. *Saffold* Undermines The Policy Considerations Supporting AEDPA's Statute Of Limitations

Nearly two centuries ago, John Marshall recognized that a claim that could be "brought at any distance of time . . . would be utterly repugnant to the genius of our laws." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.). Petitioner submits that *Saffold's* indefinite tolling rule surely must be repugnant to the members of Congress who enacted AEDPA's statute of limitations and whose policy judgments have been severely undermined by *Saffold*.

In *Felker v. Turpin*, 518 U.S. 651, 662 (1996), this Court recognized that several sections of AEDPA "impose new requirements" for granting habeas corpus relief under 28 U.S.C. § 2254. *Felker* reiterated that:

> [W]e have long recognized that "the power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman*, 4

> Cranch 75, 94, 2 L.Ed. 554 (1807), and we have likewise recognized that judgments about the proper scope of the writ are "normally for Congress to make." *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S.Ct. 1293, 1298, 134 L.Ed.2d 440 (1996).

518 U.S. at 664; *cf. Sumner v. Mata*, 449 U.S. 539, 548, fn. 2 (1981) [recognizing this Court's duty to ensure that the federal courts do not exceed their jurisdiction and stating that "the 1966 amendments embodied in section 2254(d) were intended by Congress as limitations on the exercise of that jurisdiction"].

In *Lonchar v. Thomas*, 517 U.S. 314 (1996), this Court stated that:

> Congress, the Rule writers, and the courts have developed . . . procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise. Those principles seek to maintain the courts' freedom to issue the writ . . . while at the same time avoiding serious, improper delay, expense, complexity, and interference with a State's interest in the "finality" of its own legal processes. [Citations omitted.] These legal principles are embodied in statutes, rules, precedents, and practices that control the writ's exercise. Within constitutional constraints they reflect a balancing of objectives (sometimes controversial), which is normally for Congress to make . . . .

517 U.S. at 322-323. Even Professor Larry W. Yackle, a leading proponent of expanding the scope of the writ of habeas corpus whose work was cited by this Court in *Lonchar*, has recognized that this Court "should . . . defer to the policy judgments made by the legislative branch." Larry W. Yackle, *The Habeas Hagioscope*, 66 Southern California Law Review 2331, 2333 (1993). In the instant case, it is necessary to

undertake statutory interpretation of the meaning of "pending" in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), to determine whether *Saffold's* indefinite tolling rule is contrary to congressional intent and to determine whether *Saffold* undermines the policy judgments made by Congress when it enacted AEDPA.

In *Duncan v. Walker*, 121 S.Ct. 2120, 2124 (2001), this Court explained that "[o]ur task is to construe what Congress has enacted. We begin, as always, with the language of the statute." *Id.* at 2124; *Williams v. Taylor*, 529 U.S. 420, 431 (2000). Where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989) quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917). This Court gives "the words of a statute their '"ordinary, contemporary, common meaning,"' absent an indication Congress intended them to bear some different import." *Williams v. Taylor*, 529 U.S. at 431, quoting *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997) and *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993).

Congress did not provide a definition of the term "pending" in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2). However, the word has a common meaning among lawyers, judges and the general public. Litigation concerning a legal issue or claim (here an application for state collateral review concerning a claim of ineffective assistance of counsel) is considered "pending" when it remains undecided, awaiting decision. *Robinson v. Ricks*, 163 F.Supp.2d 155, 164 (E.D.N.Y. 2001); *see Geraci v. Senkowski*, 23 F.Supp.2d 246, 252 (E.D.N.Y. 1998) ["the word 'pending' in § 2244(d)(2) has an unambiguous meaning: a motion is pending if it has been filed with the Court but has yet to be decided"], *aff'd*, 211 F.3d

6 (2d Cir.), *cert. denied*, 531 U.S. 1018 (2000).[6] It follows that when an application for state post-conviction or other collateral review is denied, "it is no longer considered pending in the court that denied it. Nor is an appeal from such a denial generally considered pending until the application for leave to appeal is filed." *Robinson v. Ricks*, 163 F.Supp.2d at 164.

Furthermore, the commonly understood meanings of the term "pending"

> are consistent with the dictionary definitions to which courts often turn in the absence of a legislative definition. *See, e.g., MCI Telecommunications Corporation v. American Telephone and Telegraph Co.*, 512 U.S. 218, 225 (1994) . . . . Black's Law Dictionary defines "pending" as "[r]emaining undecided; awaiting decision." *Black's Law Dictionary* 1154 (7th ed. 1999). Other dictionaries define the term similarly. *See Webster's Third New International Dictionary* 1669 (1993) ("not yet decided: in continuance: in suspense"); *The Random House Dictionary of the English Language* 1065 (1966) ("remaining undecided; awaiting decision or settlement; unfinished"); *The Oxford English Dictionary* Vol. XI, at 468 (2d ed.1989) ("[r]emaining undecided, awaiting decision or settlement).
>
> Thus, a commonsense reading of the word "pending" in § 2244(d)(2) requires the conclusion that [an application for state post-conviction or other collateral review] is pending while it is before a court awaiting decision. To construe the term otherwise, that is, to say that a post-conviction motion remains "pending" even where there is no undecided application before any court, would distort the plain meaning of the term.

6. It is apparent that Respondent Saffold himself understood "pending" to mean undecided given his response to question 17 on each of his state petitions for habeas corpus. *See* Joint Appendix at 15 (superior court petition), Joint Appendix at 28 (court of appeal petition), and Joint Appendix at 39 (state supreme court petition) where in response to question 17 ("Do you have any petition, appeal, or other matter pending in any court?") Respondent Saffold answered: "No."

Robinson v. Ricks, 163 F.Supp.2d at 164.

Nevertheless, the circuit courts have chosen to construe the term "pending" more broadly. In *Barnett v. Lemaster*, the Tenth Circuit concluded that "pending"

> must be construed more broadly to encompass all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application. Such a construction comports with the generally-accepted definition of the term. *See, e.g., Beverly Community Hosp. Assoc. v. Belshe*, 132 F.3d 1259, 1264-65 (9th Cir. 1997) (statutory reference to "pending" lawsuits encompasses not only undecided cases at district court level but also cases pending on appeal), *cert. denied*, — U.S. —, 119 S.Ct. 334, 142 L.Ed.2d 276 (1998); *de Rodulfa v. United States*, 461 F.2d 1240, 1253 (D.C.Cir. 1972) ("suit is pending until the appeal is disposed of, and until disposition any judgment appealed from it is still sub judice").

167 F.3d at 1323. However, *Beverly Community Hospital Association v. Belshe*, 132 F.3d 1259 (9th Cir. 1997) and *Rodulfa v. United States*, 461 F.2d 1240 (D.C.Cir. 1972), the cases relied on by *Barnett* for a broader definition of "pending," both involved the issue of whether changes in the law made after a lower court decision but before finality on appeal may nevertheless apply to lawsuits still pending on appeal. The

well-established answer is that such changes in the law may apply to lawsuits which have not yet become final on appeal. *Hamling v. United States*, 418 U.S. 87, 101-102 (1974) ["Since the judgment in this case has not become final, we examine the judgment against petitioners in the light of the principles laid down" in prior decisions establishing "a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review."]; *Mackenzie v. A. Engelhard & Sons Co.*, 266 U.S. 131, 142-143 (1924) ["An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of."].

The statute at issue here involves collateral litigation following finality of direct review rather than lawsuits that have not become final on appeal. AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), concerns applications for state post-conviction or other collateral review that necessarily are filed after a judgment has become "final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Petitioner submits that the long line of cases construing lawsuits to be "pending" until finality of appeal are inapposite to litigation concerning habeas corpus applications which necessarily are pending and decided after finality on direct appeal. *Cf. Teague v. Lane*, 489 U.S. 288 (1989) [federal habeas relief will be unavailable if the claim rests on a "new rule" which was announced or would be created after petitioner's state appeal]; *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1987) [finality is defined as the expiration of the time within which to petition for writ of certiorari on direct review]. Consequently, circuit courts have erred by relying on a broad definition of pending such as that set forth in

> Black's Law Dictionary, 6th ed. P. 1134 (1990) defin[ing] "pending" as,
>
> > [b]egun, but not yet completed; during; before the conclusion of; prior to the

> > completion of; unsettled; undetermined; in process of settlement or adjustment. Awaiting an occurrence or conclusion of action, period of continuance or indeterminacy. Thus, an action or suit is "*pending*" from its inception until the rendition of *final judgment*. An action is "pending" after it is commenced by either filing a complaint with the court or by the service of a summons. (emphasis added).

Swartz v. Meyers, 204 F.3d at 421; *Nara v. Frank*, 264 F.3d at 317. Although *Swartz v. Meyers*, 204 F.3d at 421 correctly concluded that the quoted "definition reflects the term's common usage," it is a common usage for an area of law (a suit or case "'pending' from its inception until the rendition of *final judgment*") which is quite distinct from the legal setting in the present case, which concerns collateral review **after** final judgment.

The inappropriateness of applying the broader definition of pending to post-conviction or other collateral review becomes especially apparent when it is applied to collateral review in California. In California, the supreme court, intermediate courts of appeal and superior courts all have original habeas corpus jurisdiction. *See*, *Nino*, 183 F.3d at 1006, fn.2. Although a superior court order denying habeas corpus relief is non-appealable, a state prisoner may file a new habeas corpus petition in the court of appeal. *Id.* If the court of appeal denies relief, the petitioner may seek review in the California Supreme Court by way of a petition for review filed within 10 days. *Id.* at 1006, fn.3. Although petitions for review are "strongly preferred," a petitioner may instead file an original habeas petition in the California Supreme Court. *Id.*[7] Given

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7. Under California's "general rule regarding timeliness," a "habeas corpus petition must be filed within a reasonable time after the petitioner or

that superior court denials of habeas corpus relief are non-appealable, it is apparent than nothing can be pending between the denial of a habeas petition in the superior court and the filing of an original petition in the court of appeal. Similarly, if a petitioner files an original petition in the state supreme court rather than a petition for review, nothing is pending between the denial by the appellate court and the filing of the original petition in the supreme court.

Although application of AEDPA's statute of limitations to petitioners attempting to exhaust their claims under California's collateral review process might appear to be harsh, the system in fact provides the petitioner with the opportunity to timely exhaust his state remedies even though he has not been particularly diligent with regard to the one-year period granted by Congress. A California petitioner such as Respondent Saffold, whose lack of diligence has used up most of the one-year statute of limitations period, has the option of by-passing the superior and/or appellate courts and instead filing his original petition directly with the California Supreme Court. Item number 18 on California's standard petition for writ of habeas corpus form states: "If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court." Joint Appendix at 16, 29 and 39. Respondent Saffold could have filed directly in the supreme court stating in response to item number 18 on the standard form that he was applying directly to the supreme court without filing first in the lower courts to facilitate exhaustion of his state claims prior to filing his federal petition within the one-year federal statute of limitations.

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counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 5 Cal.4th 813, 828, fn.7 (1993). Claims of ineffective assistance of counsel "should be filed in conjunction with the direct appeal" as a verified petition for habeas corpus. *Id.*, citing *People v. Pope*, 23 Cal.3d 412, 426-427, fn. 17 (1979).

The conclusion that 28 U.S.C. § 2244(d)(2) was not intended to toll the limitations period during the interval between the denial of an application for post-conviction relief and the filing of an appeal (or application seeking leave to appeal, motion for belated appeal, motion for reconsideration or rehearing, motion for extension of time to appeal, *nunc pro tunc* motion, etc.) from such a denial is strongly supported by the structure of the statute as a whole. *Robinson v. Ricks*, 163 F.Supp.2d at 164-165; *see Lexecon Inc., v. Milberg Weiss Bershad Hynes & Lerach et al.*, 523 U.S. 26, 36 (1998) ["[A] statute is to be considered in all its parts when construing any one of them."]. First, as explained by the court in *Robinson*,

> a comparison of the provision with another tolling provision in AEDPA reveals that if Congress had intended to include the entire state post-conviction relief process, including gaps like the one at issue here, in the period tolled pursuant to § 2244(d(1)(A), it knew precisely how to do so. Section 2263(b)(2) is the death-penalty counterpart to § 2244(d)(2), tolling the statute of limitations applicable to federal habeas petitions that challenge capital convictions. The limitations period applicable to such petitions is tolled not merely while applications for state post-conviction review are "pending," but rather "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition." 28 U.S.C. § 2263(b)(2). The different language in § 2244(d)(2) indicates that Congress did not intend the statute of limitations in non-capital cases [or capital cases in states that did not qualify under or opt in to Chapter 154 provisions] to be tolled during the entire post-conviction review process, but rather only when such proceedings were actually pending before a state court.

Robinson v. Ricks, 163 F.Supp.2d at 165; *see Duncan v. Walker*, 121 S.Ct. at 2124 ["a comparison of the text of § 2244(d)(2) with the language of other AEDPA provisions supplies strong evidence that, had Congress intended to include federal habeas petitions within the scope of § 2244(d)(2), Congress would have mentioned "Federal" review expressly"]; *id.* at 2125 quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997) and *Russello v. United States*, 464 U.S. 16, 23 (1983) [""[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.""].

Second, as explained by the court in *Robinson*,

> a comparison of § 2244(d)(1)(A), which in this case determines when the limitations period commences, and § 2244(d)(2), which provides for its tolling, supports the conclusion that Congress did not intend § 2244(d)(2) to toll the limitations period during the intervals between the various stages of the post-conviction review process. Under § 2244(d)(1)(A), a state court "judgment" becomes "final," and the one-year period commences, on "the conclusion of direct review or the expiration of the time within which direct review might be sought." Thus, the mere availability of judicial review will prevent a judgment from becoming final, and delay the onset of the limitations period, even if no such proceeding is actually commenced. This stands in sharp contrast to § 2244(d)(2), which tolls the period once it has commenced only while a properly filed "application" for collateral review is "pending." In effect, Robinson's proposed interpretation of § 2244(d)(2) imports into that provision, to define when state collateral review is "pending," the part of § 2244(d)(1) that defines when direct review becomes final–that is, it would define "pending" to include not only the period in which the application for collateral review remained undecided, but also further periods, as long as the time for seeking review of an adverse decision has not expired.

Robinson v. Ricks, 163 F.Supp.2d at 165.

Finally, the straightforward construction of the term "pending" set forth by the court in *Robinson v. Ricks* is consistent with AEDPA's purpose and policy. In *Williams*, this Court recognized "AEDPA's purpose to further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. at 436. In *Duncan*, this Court recognized AEDPA's "clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review" and stated that "[s]ection 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions **as soon as possible**." *Duncan v. Walker*, 121 S.Ct. at 2129, italics in original, emphasis added.

AEDPA's legislative history supports the conclusion that Congress drafted 28 U.S.C. § 2244(d) to strongly encourage diligent pursuit of state remedies by tolling the statute of limitations only for the time during which a properly filed application for state post-conviction or other collateral review was actually under consideration by a state court.

The House Report on AEDPA states:

> [T]he bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings. . . . To help accomplish [this] purpose, the bill imposes periods of limitation on federal habeas corpus petitions filed under 28 U.S.C. section

> 2254. . . . This reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner.

H.R.Rep. No. 104-23, at 29 (1996). Limiting the tolling provision to periods when state post-conviction applications remain undecided by the state courts, *i.e.*, excluding from its coverage potentially lengthy gaps between levels of state court review, will encourage the diligent pursuit of remedies in those courts. In turn, that will curb delays in state post-conviction litigation and accelerate the federal habeas process. *See Duncan*, 121 S.Ct. at 2128 ("The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.") (citation omitted).

Robinson v. Ricks, 163 F.Supp.2d at 165-166. At the same time, AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), promotes comity by tolling all time during which state courts are considering properly filed applications for collateral relief.

Congress drafted AEDPA's statute of limitations in a manner that promotes finality, comity and diligence on the part of the habeas corpus petitioner. In doing so, Congress took care to protect the rights of habeas corpus petitioners. AEDPA's statute of limitations will not begin to run until the petitioner could have discovered through the exercise of due diligence the factual predicate of the claims presented (*see* § 2244(d)(1)(D)),

and the petitioner is protected from interference by the state by § 2244(d)(1)(B) which provides that if an impediment to filing an application is created by State action in violation of the Constitution or laws of the United States, the limitation period shall not begin to run until the date on which the impediment to filing created by such State action is removed. This provides a strong incentive for the states to facilitate the smooth filing of applications for collateral relief. Given these protections, 28 U.S.C. § 2244(d) reasonably requires petitioners to act diligently by either filing early within the one-year period in order to avoid concern over time lost between different levels of state court collateral review or, in the event that a petitioner has wasted a large chunk of his time prior to filing his first state application, to be especially diligent in order to minimize or eliminate the gaps between those levels of review.

Petitioner submits that Congress did not intend to promote delay on the part of the petitioner by permitting tolling for gaps between levels of state review that happen to be permissible under state procedural laws or rules providing varying periods to timely file appeals, motions for rehearing, motions for extension of time, or petitions for review under state law. Such state procedural laws and rules cannot be allowed to define the acceptable time frame for the federal statute of limitations. Congress has specifically provided for a defined time period (a full year plus 90 days for certiorari) which is intended to provide an incentive for diligent behavior on the part of the petitioner while at the same time protecting him from events outside of his control. To allow additional tolling based upon time periods permitted under state law would open the door for state procedural laws and rules to in effect trump the federal statute of limitations.[8/]

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8. It should be noted that in *Lonchar*, this Court recognized that:

> Even in an area, such as exhaustion, where judges have considerable discretionary authority, "appropriate

Analysis of the policy considerations supporting AEDPA's statute of limitations reinforces the conclusion that Congress intended to adopt the "ordinary or natural" meaning of "pending" in 28 U.S.C. § 2244(d)(2) and did not intend to allow tolling during the gaps between the rendering of a decision on a habeas corpus application and the filing of petitions for review, appeals or additional original petitions in the course of exhausting state collateral claims.[9] In *Wood v. Carpenter*, 101 U.S. 135 (1879), this Court stated that "[s]tatutes of limitation . . . promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. . . . Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together." *Id.* at 139; *Shepherd v. Thompson*, 122 U.S. 231, 236 (1887) ["The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost."].

In *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), this Court addressed the importance of ensuring accurate fact-finding by minimizing the deterioration of evidence as follows:

> deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme[.]"

517 U.S. at 327-328, quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

9. The following discussion of policy considerations relies heavily on Tyler T. Ochoa's and Andrew J. Wistrich's article, *The Puzzling Purposes of Statutes of Limitation*, 28 Pacific Law Journal 453-514 (1997)(hereafter "Ochoa & Wistrich").

> [T]he finding of ultimate facts . . . is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

Id. at 487; *see United States v. Kubrick*, 444 U.S. 111, 117 (1979) [statutes of limitation "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise"]; *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944) ["Statutes of limitations . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."].[10]

Individuals other than the parties, such as witnesses, jurors, victims and victims' family members also benefit from statute of limitations. Such individuals can benefit from a reduction in uncertainty brought about by the statute of limitations' promotion of finality. Witnesses

> may have their peace of mind disrupted by long-outstanding claims. Those who have witnessed an occurrence involving potential wrongdoing are faced with the possibility that they may be called to testify. For some, the prospect of testifying causes only minor

10. It also should be noted that prompt enforcement of substantive law results in greater deterrence of wrongdoing and that "inaccurate adjudication decreases deterrence." Ochoa & Wistrich at 473, 492.

> annoyance; for others, it is anticipated with great dread. Relatively few people, and almost none who have testified previously, relish the thought.

Ochoa & Wistrich at 462. In federal habeas corpus litigation involving allegations of juror misconduct, jurors are likely to find themselves in the same position as other witnesses as they are called upon for declarations and for testimony at evidentiary hearings years after the trial.

In addition to promoting repose by protecting parties from defending stale claims, "[a] second policy underlying the statute [of limitations] is to require plaintiffs to diligently pursue their claims." *Jolly v. Ili Lilly & Co.*, 44 Cal.3d 1103, 1112, 751 P.2d 923, 928, 245 Cal.Rptr. 658, 662-63 (1988); *see also Kaiser Found. Hosp. v. Workers Compensation Appeals Bd.*, 39 Cal.3d 57, 62, 702 P.2d 197, 200, 216 Cal.Rptr. 115, 118 (1985) ["The purpose of any limitation statute is to require 'diligent prosecution of known claims . . . .'"]. *See* 28 U.S.C. § 2244(d)(1)(D) [stating that the limitation period shall run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence" if that is the latest event among those listed in the statute]. With regard to this diligence requirement, it is important to recognize that:

> [B]y punishing a few [habeas corpus petitioners], the limitation system benefits numerous others. Late filing has disadvantages for [habeas corpus petitioners] as well as for [the state]. Suppose, for example, that a [habeas corpus petitioner] waits ten or twenty years before [filing his petition]. Unless the [petitioner] has been lying in wait for the most advantageous time to [file his petition] . . . the [petitioner's] evidence will have deteriorated to some extent and perhaps as badly as the [state's]. Since the [petitioner] bears the burden of proof on most issues,

> any degradation in the quality of evidence generally operates to the [petitioner's] disadvantage. . . . Assuming that [petitioners], like most people, tend to procrastinate, limitation of actions may benefit [petitioners] by giving them an incentive to [file their petitions] while their claims are still fresh and, therefore, at least marginally, more likely to succeed . . . Although some [petitioners] lose their claims as a result of the limitations bar, others are stimulated to seek redress promptly, to their . . . benefit.

Ochoa & Wistrich at 490-491, footnotes omitted.

Furthermore, statutes of limitation serve the goal of preserving the integrity of the legal system. "[I]f society believes that evidence deteriorates over time, and that erroneous decisions are more likely to occur if the gap in time between underlying events and adjudication is lengthy, then statutes of limitation enhance the legitimacy of the legal system by promoting the appearance of rational decision making." Ochoa & Wistrich at 481; *see Offutt v. United States*, 348 U.S. 11, 14 (1954) ["Justice must satisfy the appearance of justice."].

Petitioner submits that the aforementioned policy considerations militate against *Saffold's* indefinite tolling rule which would effectively place habeas corpus litigation back in the pre-AEDPA period discussed in the Powell Report involving "years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law" with "[t]he resulting lack of finality undermin[ing] public confidence in our criminal justice system." U.S. Judicial Conference, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal, 1 (1989). As this Court pointed out in *MCI Telecommunications Corporation v. American Telephone and Telegraph Co.*, 512 U.S. 218, 229 (1994), "[f]or the body of a law, as for the body of a person, whether a change is minor or major depends to some extent upon the importance of the item changed to the whole. Loss of

an entire toenail is insignificant; loss of an entire arm tragic." Petitioner submits that the impact on AEDPA's statute of limitations brought about by *Saffold's* alteration of AEDPA's tolling rule is akin to removing the heart of the statute because *Saffold's* indefinite tolling rule effectively eviscerates the statute of limitations.

The majority opinion in *Saffold* has improperly diluted Congress's power to define the proper scope of the writ of habeas corpus by interpreting AEDPA'S tolling provision, 28 U.S.C. § 2244(d)(2), in a way that is inconsistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d at 807; *Melancon v. Kaylo*, 259 F.3d at 407. Consequently, Petitioner respectfully requests that this Court reverse *Saffold*, thereby ensuring that Congress's intent is not thwarted.

II.

THIS COURT SHOULD RESOLVE THE CONFLICT OVER THE MEANING OF "PENDING" IN AEDPA'S TOLLING PROVISION, 28 U.S.C.§2244(d)(2), BY ESTABLISHING A UNIFORM NATIONAL RULE THAT ACCURATELY REFLECTS CONGRESSIONAL INTENT

As discussed *supra* in Argument I, statutory analysis of the meaning of "pending" set forth in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), affirms the conclusion that *Saffold* has improperly diluted AEDPA's statute of limitations by interpreting the tolling provision in a manner inconsistent with congressional intent. However, this same statutory analysis supports the additional conclusion that *Nino* and the line of other circuit court cases providing for tolling during the gaps between tiers of state collateral review also have

improperly expanded tolling beyond the intent of Congress, although to a lesser degree than *Saffold*.

It is undisputed that a habeas corpus petitioner who files his federal petition one day late will be barred by AEDPA's statute of limitations. *See Green v. White*, 223 F.3d 1001, 1002-1003 (9thCir. 2000); *Jackson v. Dormire*, 180 F.3d 919, 920 (8th Cir. 1999); *Rashid v. Khulmann*, 991 F.Supp. 254, 259 (S.D.N.Y. 1998) ["The tolling provision does not . . . 'revive' the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations."]; *accord, Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) ["A state-court petition . . . that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled."]; *Sorce v. Artuz*, 73 F.Supp.2d 292, 294, 297 (E.D.N.Y. 1999) [AEDPA's tolling provision "cannot revive a time period that has already expired"]; *Blouin v. Headley*, 70 F.Supp.2d 221, 223 (E.D.N.Y. 1999).

Fully aware of the arbitrary nature of statutes of limitations, Congress could not conceivably have intended for petitioner A (who is one day late filing his first state application for collateral relief and who thereafter diligently files the remainder of his state petitions and his federal petition without using any additional days) to be barred while petitioner B (who files his first state application just one day before the expiration of the federal statute and then delays weeks, months, or years between state filings [either within the time allowed by state law to submit subsequent filings, or after being granted leave to file outside the standard time period, or nunc pro tunc, or because as in *Saffold* a state court addresses the merits despite a finding of untimeliness]) is found to be timely under the statute.[11/] This

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11. It should be noted that the unfairness of such treatment would be even greater if petitioner A had filed his first state application for collateral relief 366 days after finality of direct review and petitioner B had

would not make sense given the intent of the statute to encourage diligence on the part of petitioners in order to promote finality of state court judgments.

However, the circuit court cases rejecting the gap theory have opened the door to this very scenario in which petitioner B, who is much less diligent than Petitioner A , is nevertheless found to be timely while petitioner A is barred by the statute of limitations. *See, e.g., Nara v. Frank*, 264 F.3d at 314-319; *Melancon v. Kaylo*, 259 F.3d at 405-407; *Gibson v. Klinger*, 232 F.3d at 803-807; *Fernandez v. Sternes*, 227 F.3d at 978-981; *Swartz v. Meyers*, 204 F.3d at 420-424; *Peterson v. Gammon*, 200 F.3d at 1203-1205; *Bennett v. Artuz*, 199 F.3d 116 at 119-120; *Mills v. Norris*, 187 F.3d at 882-884; *Taylor v. Lee*, 186 F.3d at 560-561; *Nino v. Galaza*, 183 F.3d at 1004-1007; *Barnett v. Lemaster*, 167 F.3d at 1323.

In *Chase Securities Corporation v. Donaldson*, 325 U.S. 304, 314 (1945), this Court recognized that statutes of limitations are created through legislation rather than judicial process, that they "represent a public policy about the privilege to litigate" and that they "are by definition arbitrary." Petitioner submits that the circuit courts' erroneous expansion of tolling beyond the intent of Congress has been the result of a noble but misguided effort to ameliorate the "harsh" consequences of AEDPA's statute of limitations. As emphasized by Ochoa and Wistrich, "[t]he limitation system is the product of the interplay between two competing sets of policies: those supporting the extinguishment of untimely claims and those encouraging the resolution of all claims, whether timely or untimely, on their substantive merits." Ochoa & Wistrich at 454-455. In an effort to encourage the resolution of a greater number of claims, the circuit courts unfortunately have ignored or distorted the policy judgments underlying AEDPA's statute of limitations. By

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waited five or ten years after finality of direct review before filing his first state application for collateral relief on April 24, 1997, the last day of AEDPA's one-year grace period.

rejecting the gap theory, the circuit courts have sought to transform AEDPA's statute of limitations through judicial process and have failed to "defer to the policy judgments made by the legislative branch." Larry W. Yackle, *The Habeas Hagioscope*, 66 Southern California Law Review at 2333. In short, the circuit courts have ignored or discounted the legislative history and statutory language which strongly supports the conclusion that Congress intended to adopt the ordinary or natural meaning of the word pending and did not intend to allow tolling during the gaps between the rendering of a decision and the filing of petitions for review, appeals or additional original petitions in the course of exhausting state collateral claims.

As noted in *Robinson v. Ricks*, "[t]he most frequently cited justification for these decisions is that the principle of comity underlying the exhaustion doctrine would be undermined by refusing to toll the statute of limitations during the intervals between state court proceedings." 163 F.Supp.2d at 167. However the circuit courts' proposed justification for rejecting the gap theory is faulty because application of the gap theory would not have any negative impact whatsoever on the state courts' right to pass first on federal constitutional challenges to convictions obtained in their courts. Section 2244(d)(2) provides tolling for all of the time during which a properly filed application for state collateral review is pending before a state court. In short, AEDPA's tolling provision encourages both exhaustion and comity by requiring state prisoners to pursue state collateral review without unnecessary delay. The state prisoner's diligence in pursuing exhaustion is rewarded by tolling the entire time needed by state courts to consider the prisoner's application.

> As long as a prisoner has filed an application for post-conviction review, or for review of the denial of such an application, AEDPA provides for state courts to take all the time they need to properly decide the

> federal questions. Congress's desire to shorten the gaps between the levels of review in the state system [by motivating state prisoners to pursue state collateral review without unnecessary delay] does not violate the principle of comity underlying the exhaustion doctrine.

163 F.Supp.2d at 167.

Given the "backdrop of widely divergent state procedural rules," and given the tendency of the Ninth Circuit and other circuit courts to "stray from the principle that 'pending' means 'undecided,'" it is understandable that the federal courts to date have reached widely divergent conclusions on the meaning of "pending" under § 2244(d)(2). *Robinson v. Ricks*, 163 F.Supp.2d at 168-169. After noting the direct conflict between *Saffold* and *Fernandez*, the *Robinson* court pointed out that:

> Other circuits will toll only those periods "in which the petitioner *could have* sought an appeal under state law." *Gibson*, 232 F.3d at 803-04 & n.1; *see also Swartz*, 204 F.3d at 424; *Mills v. Norris*, 187 F.3d 881, 884 (8th Cir. 1999). The rationale here is that when a petitioner is permitted by law to file an appeal, the courts presume he is attempting to appeal. *Gibson*, 232 F.3d at 804. This is especially unpersuasive, as it equates a presumed preparation for an available appeal with a "pending" judicial proceeding, and does so even if no appeal is filed.
>
> The Seventh Circuit has yet another approach. It finds it "sensible" to deem a post-conviction motion to be "pending" during the period when it could be filed, but only if it is in fact filed. *Fernandez*, 227 F.3d at 980. The Eighth Circuit appears to have adopted the same approach in *Peterson v. Gammon*,

> 200 F.3d 1202, 1205 (8th Cir. 2000) ("The ordinary meaning of the word 'pending,' in our view, includes the entire period during which a notice of appeal from a denial of post-conviction review would be timely, assuming such a notice was in fact filed. . . ."), but that decision conflicts with its decision just five months earlier in *Mills*. *See* 187 F.3d at 884 ("[W]e conclude that the state postconviction appeal was 'pending' for purposes of § 2244(d)(2) until . . . the end of [the] ninety-day period" that petitioner was allowed to perfect his appeal under state law even though he failed to do so.).

163 F.Supp.2d at 168-169, italics in original, footnote omitted. Furthermore, a number of circuit courts have distorted AEDPA's tolling provision by superimposing § 2244(d)(1)(A)'s definition of "final" onto the definition of "pending" set forth in § 2244(d)(2). The *Robinson* court explained that one basis for its decision that tolling should not be allowed for gaps between denial of an application for state post-conviction relief and the filing of leave to appeal that denial

> is the careful distinction within § 2244(d) between a state "judgment" becoming "final," which triggers the limitations period, and a properly filed "application" being "pending," which tolls it. The former event takes into account periods in which appellate review was available, whether or not it was sought, while the latter conspicuously (and, I believe, deliberately), does not. Another reason I am unpersuaded by the cases that adopt broader interpretations of the term "pending" is that they routinely disregard that distinction. In *Swartz*, for example, the Third Circuit explicitly conflated the two terms. To define the term "pending," it applied the definition of "final," which led the court "to the conclusion that for purposes of §

2244(d)(2) 'pending' includes the time for seeking discretionary review, whether or not discretionary review is sought." 204 F.3d at 421. Indeed, this approach has spawned a body of case law that virtually substitutes the § 224[4](d)(1)(A) definition of "final" for the term "pending" in the tolling provision in § 2244(d)(2). Specifically, the Fifth, Seventh and Tenth Circuits have all held that, although post-conviction applications are "pending" between one state court's disposition and a timely filed appeal, they cease to be "pending" after the applicable period to appeal has expired. *Melancon*, 2001 WL 822453, at *4; *Fernandez*, 227 F.3d at 980; *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000). If Congress had intended such a result, it could readily have provided for tolling until state collateral review becomes "final, by the conclusion of such review or the expiration of the time for seeking such review. Alternatively, it could have defined "final" by reference to "the final state court disposition of such petition," as it did in § []2263(b)(2) for capital habeas petitions. Rather Congress provided for tolling only while a specific, filed application for collateral review is "pending." Its failure to use the terminology of either § 2244(d)(1)(A) or § 2263(b)(2), and its use of the unambiguous word "pending" instead, requires the narrower construction of the tolling provision that I employ here.

163 F.Supp.2d at 167-168.

In *Nara v. Frank*, the Third Circuit has further muddied the waters by first following *Swartz's* holding that "pending" for purposes of § 2244(d)(2) "'includes the time for seeking discretionary review, whether or not discretionary review is sought'" and later reasoning that tolling should not be granted for the 14-day period during which the petitioner could

have but did not seek reconsideration by the Pennsylvania Supreme Court. 264 F.3d at 317-319. The *Nara* court explained the disparity as follows:

> It is true that some language in our . . . decision in *Swartz* seems to suggest a different result. . . . But *Swartz* specifically dealt with the time in which a petition for allowance of appeal could be brought to the Pennsylvania Supreme Court. We recognized that this period must be counted in the tolling analysis because a contrary holding would force a petitioner to file a habeas petition before exhausting state remedies. *See [Swartz*, 204 F.3d] at 422. The same is not true for the 14-day period to file a motion for reconsideration. Once the Pennsylvania Supreme Court denies review the first time, the state prisoner may file a habeas petition in federal court; s/he obviously need not file a motion for reconsideration in order to exhaust the state remedies. Therefore, the principles of comity that guided our holding in *Swartz* do not apply in Nara's case.[12/]
>
> As we noted in *Stokes* [*v. District Attorney of the County of Philadelphia*, 247 F.3d 539 (3d Cir. 2001)], § 2244(d)(2) uses the terms "properly filed" and "pending." *See* 247 F.3d at 543. If Nara had indeed filed a motion for reconsideration, that motion would be "pending" in the Pennsylvania Supreme Court

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12. For a conflicting view, see *Bunney v. Mitchell*, 262 F.3d 973, 974 (9th Cir. 2001) holding that tolling should be granted for an additional 30 days after the California Supreme Court's denial of petitioner's state petition for habeas corpus because, under the Ninth Circuit's interpretation of Rule 24 of the California Rules of Court, "a denial of a habeas petition within the California Supreme Court's original jurisdiction is not final for 30 days (and therefore is subject to further action during that time)."

> until it was decided by that court. However, because Nara did not file a motion to reconsider, nothing was "properly filed" or "pending." Therefore, we reject Nara's argument that the 14 days during which he could have filed a motion to reconsider should have been counted to toll the one-year statute of limitations under § 2244(d).

264 F.3d at 319.

Although *Nara* correctly determined that no tolling should be granted for the 14-day period allowed for reconsideration because "nothing was 'properly filed' or 'pending,'" Petitioner submits that *Nara* and *Swartz* erred by reasoning that petitioners should be granted tolling for the period they had available to seek discretionary review in the state supreme court despite their failure to file applications for such discretionary review. The flaw in the reasoning is that it is based upon the faulty premise that disallowance of tolling for unfiled state applications for discretionary review would force petitioners to file federal petitions before exhausting their state remedies. While it is true that such unexhausted federal petitions would be dismissed under *Rose v. Lundy*, 455 U.S. 509, 522 (1982) for failure to exhaust, Petitioner submits that the disallowance of tolling for unfiled state applications would not force petitioners to file federal petitions. Rather, just as Congress intended, the disallowance of tolling for unfiled state applications would provide a strong incentive for petitioners to diligently file their state applications, thereby enabling them to exhaust their state remedies in a timely manner and pave the way for timely and fully exhausted federal petitions.

In addition to the confusion created by the circuit courts' conflicting holdings on tolling, the circuit courts' rejection of the gap theory has also created the potential for widely divergent grants of tolling due to the diversity of state procedural rules and statutes. A survey of the circuit court cases rejecting the gap theory reveals that the potential amount of time

available under state law to file for review of denials of habeas applications ranges from as low as no time at all or just 10 days depending on the level of "review" in California, *see Nino*, 183 F.3d at 1006, fn.2 and 3, to periods of up to 18 months or more in Arkansas, *see Mills v. Norris*, 187 F.3d at 883-884.[13] Other states provide varying periods to file appeals, applications seeking leave to appeal, motions for belated appeals, motions for reconsideration or rehearing, motions for extension of time to appeal, etc. *See*, *Barnett v. Lemaster*, 167 F.3d at 1323 [30 days under New Mexico law]; *Peterson v. Gammon*, 200 F.3d at 1203 [41 days from trial court denial of post-conviction relief to appeal of the denial was tolled because the appeal was timely under Missouri state law]; *Swartz v. Meyers*, 204 F.3d at 419-420, 424-425 [30 days under Pennsylvania law to file a timely petition for allowance of appeal in the state supreme court tolled whether or not review actually sought and leaving unresolved whether or not tolling should be allowed for the time until the state supreme court rejected petitioner's request for allowance

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13. In *Nino*, the Ninth Circuit concluded that tolling should be allowed "for the entire period in which a petitioner is appropriately pursuing and exhausting his state remedies" (which in that case included a gap of 43 days between the superior court denial of Nino's first petition for state collateral relief and his subsequent original petition for state collateral relief filed in the state court of appeal) despite the fact that California law did not provide for an appeal of the superior court's denial of the first habeas petition and instead provided for the filing of a second original petition in the intermediate appellate court. 183 F.3d at 1004, 1006. In *Mills*, Arkansas state law provided for a 90-day period to file the record on appeal, but also permitted the trial court to extend the time to file the record on appeal up to 7 months and allowed the state supreme court up to 18 months to entertain motions for belated appeals. The *Mills* court held that AEDPA's one-year limitations period was tolled until the end of the 90-day period for perfecting the state court appeal, even though the petitioner did not perfect such an appeal, and it left unresolved whether or not the Arkansas appellate rules providing for 7-month extensions to file the record on appeal and for consideration of belated appeals 18 months after the decision appealed from could also give rise to tolling under AEDPA. 187 F.3d at 882-884.

of appeal nunc pro tunc]; *Fernandez v. Sternes*, 227 F.3d at 978-979 [21 days to file petition for leave to appeal under Illinois law]; *Gibson v. Klinger*, 232 F.3d at 802 [30 days to appeal under Oklahoma law]; *Melancon v. Kaylo*, 259 F.3d at 404 [30 days to request review of trial court determination under Louisiana law].

If the various circuit court decisions rejecting the gap theory are allowed to stand, there will be a wide disparity of tolling results with some petitioners receiving additional weeks, months and even years of tolling that will not be available to petitioners in other states and that was not intended by Congress. This wide disparity of tolling results will be determined in the final analysis by the vagaries of state procedural rules and laws and by the inaction of the petitioners themselves as facilitated by liberal state filing rules in their particular states. Furthermore, if the circuit court cases rejecting the gap theory are allowed to stand, the disparity in tolling results across the county could actually become worse over time if some states enact new laws or rules providing for longer periods of review/appeal/reconsideration etc., thereby further undermining the intent of Congress.

This Court recognized in *Shepherd v. Thompson*, 122 U.S. 231 (1887), that "'[t]he statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away.'" *Id.* at 236, quoting Chief Justice Marshall in *Clemenston v. Williams*, 12 U.S. (8 Cranch) 72, 74 (1814). Petitioner submits that this Court should overrule the circuit court decisions rejecting the gap theory because they inappropriately have allowed state procedural rules and statutes to in effect define the meaning of "pending" in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2). As previously discussed, Petitioner submits that the determination of the meaning of "pending" is a matter of federal law requiring a determination of the intent of Congress and that such a determination should not depend on the nature of the state law ruling in the case or even in the final analysis on the actual state

procedural rule or statute.

In *Lonchar*, this Court recognized that there has been an extended debate in Congress over a statute of limitations for federal habeas cases with "more than 80 bills that have proposed a statute of limitations for federal habeas cases since *Vasquez* [*v. Hillery*, 474 U.S. 254 (1986]." 517 U.S. at 328.[14] Significantly, with regard to the debate over federal Habeas Corpus Rule 9(a) concerning delayed petitions, the *Lonchar* court recognized

> the institutional inappropriateness of amending the Rule, in effect, through an ad hoc judicial exception, rather than through congressional legislation or through the formal rulemaking process. *See Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 624, 88 L.ED.2d 598 (1986) ("[D]espite many attempts in recent years, Congress has yet to create a statute of limitations for federal habeas corpus actions. We should not lightly create a new judicial rule . . . To achieve the same end") (citation omitted) . . .

517 U.S. at 328. In light of the fact that Congress has now acted by enacting AEDPA's statute of limitations, Petitioner submits that this Court should overrule the ad hoc judicial exceptions to AEDPA's statute of limitations which have been created by the circuits to support their rejection of the gap theory. These ad hoc judicial exceptions cannot be allowed to stand because they do not defer to the policy judgments of Congress and have resulted in a dilution of Congress's power to define the proper scope of habeas corpus.

In *Lonchar*, this Court recognized the importance of establishing a uniform national rule to guide the lower courts.

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14. *See* 517 U.S. at 333-334 for an appendix to the opinion of the court listing the bills.

> [T]his Court in *McCleskey* [*v. Zant*, 499 U.S. 467 (1991)], also reaffirmed the importance, "'in order to preclude individualized enforcement of the Constitution in different parts of the Nation,'" of "'lay[ing] down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts.'" *Id.*, at 496, 111 S.Ct., at 1471 (quoting *Brown v. Allen*, 344 U.S. 443, 501-502, 73 S.Ct. 437, 443, 97 L.Ed. 469 (1953) (opinion of Frankfurter, J.)).
>
> After all, equitable rules that guide lower courts reduce uncertainty, avoid unfair surprise, minimize disparate treatment of similar cases, and thereby help all litigants, including the State, whose interests in "finality" such rules often further. [Citations omitted.]

Lonchar v. Thomas, 517 U.S. at 323-324.

Petitioner submits that this Court should resolve the conflict over the meaning of "pending" in AEDPA's tolling provision 28 U.S.C. § 2244(d)(2), by establishing a uniform national rule that accurately reflects congressional intent. For the reasons discussed above, Petitioner submits that the gap theory most accurately reflects the intent of Congress. By recognizing that the gap theory most accurately represents congressional intent to toll the statute of limitations only when properly filed applications are pending before a state court and not during the period following decision at one level and the filing of an application for review at another level, this Court can prevent the lower federal courts from diluting Congress's power to define the proper scope of the writ of habeas corpus and can provide a uniform national rule that reflects the intent of Congress. Furthermore, a uniform national rule based upon

the ordinary and natural meaning of pending (as set forth in the gap theory) will facilitate consistency of application and enable petitioners and courts alike to easily determine the appropriate amount of tolling available in each case. Because the narrow definition of "pending" intended by Congress and implemented in the gap theory does not depend on the vagaries of state procedural law, it is easier to apply and understand than the definition adopted by the circuit courts rejecting the gap theory. Given that protective suits are more likely to be filed by petitioners who are unsure about the nature of the statute of limitations and its tolling rules, adoption of a uniform national rule based upon congressional intent as reflected in the gap theory should minimize the filing of protective suits.[15/]

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15. If this Court decides not to implement the gap theory, Petitioner requests that this Court consider establishing a bright line rule that provides as little tolling between gaps as is possible, for example 30 days between properly filed applications. Petitioner submits that a bright line tolling rule should toll no more than 90 days between each state court filing without a showing of improper state action that would justify further tolling. Although these possible bright line rules would not reflect congressional intent as accurately as the gap theory, at least they would avoid the uncertainty and lack of uniformity created by the circuit court decisions rejecting the gap theory.

CONCLUSION

For the above reasons, Petitioner respectfully requests that this Court reverse *Saffold* and reinstate the district court's dismissal of Respondent's application for writ of habeas corpus. Petitioner further requests that this Court resolve the circuit conflict over the meaning of "pending" set forth in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), by establishing a uniform national rule that accurately reflects congressional intent.

Dated: November 27, 2001

Respectfully submitted,

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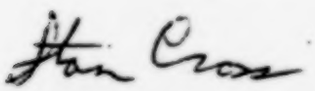

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(9)

No. 01-301

IN THE

Supreme Court of the United States

ANTHONY NEWLAND,

Petitioner,

v.

TONY EUGENE SAFFOLD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Section 2244(d)(2) of Title 28, United States Code, provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." The questions presented are:

1. Whether the Ninth Circuit was correct to adopt the unanimous interpretation of courts of appeals throughout the country that a state habeas petition is pending from the initial filing of the petition until the final resolution of any timely requests for review.

2. Whether the Ninth Circuit correctly construed Respondent Saffold's petition to the state supreme court as timely filed where the state's timeliness rules do not establish that it was untimely, and where the state supreme court's denial of the prisoner's petition reached the merits and did not clearly deem it to be untimely.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A) is reported at 250 F.3d 1262. The findings and recommendations of the magistrate judge (Pet. App. F) and the order of the district court adopting those findings and recommendations (Pet. App. E) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2001. The petition for a writ of certiorari was filed on August 20, 2001, and was granted on October 15, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244(d) of Title 28, United States Code, provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Following a jury trial in San Joaquin County, California, Respondent Tony Eugene Saffold was convicted of murder and robbery. J.A. 1. His conviction became final after direct appeal on April 20, 1992. *Id.* 1, 6. On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, became effective. AEDPA imposed a new one-year limitations period on all petitions for writ of habeas corpus filed under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(d)(1). The statute also provided for the tolling of that limitations period for "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending." *Id.* § 2244(d)(2).

On April 17, 1997, Mr. Saffold, acting *pro se*, delivered to prison authorities a petition for writ of habeas corpus for filing with the San Joaquin Superior Court, raising claims of ineffective assistance of counsel. J.A. 8-16; 75; Pet. App. A-2, 14. In a written opinion dated June 9, 1997, the superior court denied all of Mr. Saffold's claims on the merits. Pet. App A-9; J.A. 2, 18-20. On June 14, 1997, Mr. Saffold, still acting *pro se*, followed the accepted procedure in California for seeking intermediate court review of the claims raised in his superior court petition by delivering to prison authorities an original petition for writ of habeas corpus for filing with the California Court of Appeal. J.A. 21-29, 78; *see generally* Cal. Const., art. VI, § 10. On June 26, 1997, the court of appeal summarily denied the petition on the merits. J.A. 1, 30.

According to Mr. Saffold's unrebutted declaration, he was not notified of the court of appeal's denial of his petition until November 10, 1997, about four and one-half months after the decision. Pet. App. A-9 n.3; J.A. 79. California law provides two alternative methods for seeking the state supreme court's review of a court of appeal's denial of a habeas corpus petition: the prisoner may file a petition for review within ten days of the court of appeal's decision, *see* Cal. Penal Code § 1506; Cal. Rules of Ct. 24(a), 28(b), or he may file an original petition for a writ of habeas corpus within a reasonable time, *see In re Harris*, 855 P.2d 391, 398 n.7 (Cal. 1993). By the time Mr. Saffold learned of the court of appeal's denial in his case, it was too late to file a petition for review. Still acting *pro se*, Mr. Saffold therefore sought the California Supreme Court's review by delivering to prison authorities an original habeas petition to be filed with the state high court, again raising ineffective assistance of counsel claims. J.A. 31-39. Mr. Saffold delivered that petition for filing on the same day he received notice of the previous court's denial. *Id.* 78. It was formally filed three days later, on November 13, 1997. *Id.* 31.

The California Supreme Court denied Mr. Saffold's petition on May 27, 1998. Pet. App. G-1. The order denying the petition read in its entirety: "Petition for writ of habeas corpus DENIED on the merits and for lack of diligence." *Id.*

Still proceeding *pro se*, Mr. Saffold filed his first federal petition for a writ of habeas corpus on June 4, 1998. J.A. 3, 65. The district court dismissed Mr. Saffold's petition on the ground that AEDPA's one-year limitation period had expired. J.A. 3; Pet. App. E-2, F-8. The district court held that the statute of limitations had been tolled under 28 U.S.C. § 2244(d)(2) only while each state court had a petition actually under consideration. Pet. App. A-9, F-4-6. Thus, the district court excluded from tolling both the short period between the superior court's denial of Mr. Saffold's petition and the filing of his petition with the state court of appeal, and also the four and one-half month interval between the

court of appeal's decision and filing of Mr. Saffold's petition with the California Supreme Court. *Id.*

On appeal from the district court's dismissal, the Ninth Circuit followed its decision in *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000), which held that the statute of limitation is tolled under section 2244(d)(2) for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." Pet. App. A-10 (quoting *Nino*, 183 F.3d at 1006 (emphasis omitted)).[1] The court also observed that its decision in *Nino* had reserved the question "whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* A-10-11 (quoting *Nino*, 183 F.3d at 1006 n.4).

Applying the standard it had adopted in *Nino*, the Ninth Circuit held that the brief period between the superior court's decision and the filing of Mr. Saffold's petition in the court of appeal should have been tolled. *Id.* A-10. Turning to the interval between the court of appeal's decision and Mr. Saffold's filing in the state supreme court, the court first made clear that the case did not present "the question that *Nino* left open." *Id.* A-11. That is, the court concluded that this case does not present the question whether the federal limitations period is tolled during the period between a state court's denial of a habeas petition and the filing of an *untimely* appeal.

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1 The court also expressed its agreement with the similar rule adopted by the Second Circuit in *Bennett v. Artuz*, 199 F.3d 116 (2d Cir.1999), *aff'd*, 531 U.S. 4 (2000), that "a state-court petition is 'pending' from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures." *Id.* at 120. The court explained that application of the Second Circuit's formulation also yielded tolling in this case, because appellate review was not yet unavailable to Mr. Saffold when he filed his petition with the California Supreme Court. Pet. App. A-12-13 n. 8.

The court reached that conclusion after noting, first, that the purpose of AEDPA's tolling provision is to permit state courts to address the merits of a prisoner's claims, and that the California Supreme Court had addressed the merits of Mr. Saffold's claim. *Id.* Second, the court found ambiguous the reference in the California Supreme Court's order to a "lack of diligence." The court noted that although the reference might have been to the four and one-half months between the court of appeal's decision and the filing of his petition in the California Supreme Court, it might also have been to the five years that elapsed between the finality of Mr. Saffold's conviction and the filing of his first state habeas petition. *Id.* A-11-12. Deciphering the import of that reference was particularly difficult, the court concluded, because California's timeliness standards for habeas petitions were not consistently applied at the time Mr. Saffold's conviction became final. *Id.* A-12 n.7.

In light of the absence of any clear standard in California law dictating that Mr. Saffold's pursuit of state post-conviction relief was untimely, the ambiguity of the California Supreme Court's order, and the indisputable fact that the California Supreme Court did reach the merits of at least some of Mr. Saffold's claims, the Ninth Circuit declined to construe the California Supreme Court's denial of Mr. Saffold's petition as a denial for untimeliness. Accordingly, under the rule previously articulated by the Ninth Circuit in *Nino*, the court ruled that Mr. Saffold's pursuit of state collateral review had been "pending" within the meaning of section 2244(d)(2), and AEDPA's statute of limitations thus tolled, from the filing of Mr. Saffold's habeas petition in the superior court until the denial of his petition in the California Supreme Court. *Id.* A-12-13. The court then remanded the case to the district court to determine whether Mr. Saffold's

federal habeas petition had thus been filed within the one-year limitations period. *Id.* A-14.[2]

Judge O'Scannlain's dissenting opinion embraced the position that a state habeas petition remains "pending" for purposes of section 2244(d)(2) during the time that a prisoner is "properly pursuing his state-post conviction remedies" on appeal, until the time for such appeals expires and "further appellate review is unavailable under the particular state's procedures." *Id.* A-16 & n.1 (quoting *Nino*, 183 F.3d at 1006 n.4, and *Bennett*, 199 F.3d at 120). But the dissent disagreed with the majority about the appropriate application of the Ninth Circuit's decision in *Nino* to the instant case. The dissent maintained that Mr. Saffold had not been "properly pursuing his state post-conviction remedies" during the interval between the court of appeal's decision and the filing of his petition in the California Supreme Court, and concluded therefore that AEDPA's limitations period should not have been tolled during that time. *Id.* A-16-17.

In his petition for writ of certiorari, Petitioner Newland, then-Warden of California State Prison, Solano ("the Warden"), characterized the Ninth Circuit's decision in this case as permitting "tolling for any length of time despite a petitioner's dilatory behavior and a state court rejection of the petition on the ground of delay as long as the state court also addresses the merits of the claim." Pet. 9. That rule, the Warden contended, conflicts with the approach taken by the Seventh Circuit in *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000). *Fernandez* reasoned that "[i]t is sensible to say that a petition continues to be 'pending' during the period between one court's decision and a timely request for further

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2 Because the Ninth Circuit concluded that Mr. Saffold was entitled to statutory tolling, it did not address his argument that he is entitled to equitable tolling because of the delay in notifying him of the decision of the California Court of Appeal. Pet. App. 13 n. 9. The equitable tolling issue is not now before this Court, and remains to be resolved on remand if necessary.

review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be 'pending' after the time for further review has expired without action to continue the litigation." 227 F.3d at 980. Implicitly approving of *Fernandez* and relying on it as proof that the Ninth Circuit's decision below created a split among the circuits on the question whether an untimely state habeas petition is "pending" under the statute, the Warden sought this Court's review of the question "[w]hether the time during which a petitioner failed to properly pursue his state collateral remedies falls within the meaning of 'pending' set forth by 28 U.S.C. § 2244(d)(2). . . ." Pet. i.

This Court having granted certiorari to review the question that the Warden presented, the Warden now shifts ground to argue that the question whether a state prisoner is properly pursuing his state collateral remedies on appeal should have no bearing on section 2244(d)(2)'s tolling provision. *See, e.g.*, Br. 7-8, 31, 49. Arguing (Br. 8, 36-49) that every court of appeals to have addressed the issue—including the Seventh Circuit in *Fernandez*—has interpreted section 2244(d)(2) incorrectly, the Warden now relies principally upon a single district court opinion[3] to contend that a state petition for post-conviction review is pending only after it has been filed with a particular court and while it is awaiting that court's decision. Thus, the Warden urges the Court to conclude that a state petition for collateral review does not remain "pending" during the time allowed under state law for appealing a denial of the petition, even where the prisoner files an appeal within that time.

SUMMARY OF ARGUMENT

Every court of appeals to have considered the issue has correctly concluded that a state application for collateral review is "pending" within the meaning of 28 U.S.C. § 2244(d)(2), and AEDPA's one-year statute of limitations

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3 *Robinson v. Ricks*, 163 F. Supp. 2d 155 (E.D.N.Y. 2001).

for federal habeas corpus petitions is thus tolled, from the time the application is filed until the final disposition of any timely appeal relating to the application. The Warden's invitation to discard this unanimous interpretation and to conclude instead that section 2244(d)(2) provides tolling only for the periods during which a state petition is actually before a court awaiting decision—and not during the time allotted under state law to appeal from such a decision—lacks merit and should be rejected.

I. The unanimous position of the courts of appeals is strongly supported by the plain text of section 2244(d)(2). The statute refers to the time during which a state application for collateral review is "pending," thus employing a term whose plain meaning and common judicial use encompass all the time from the filing of a case until the final resolution of any timely appeals. In addition, the statute's reference to the "time" that an "application" is pending confirms that a prisoner's request for collateral review remains pending during one continuous period of time, and not, as the Warden contends, only during the series of disconnected periods in which successive submissions are before various courts awaiting decision. Moreover, the Warden is unsuccessful in his attempt to buttress his reading of section 2244(d)(2) by contrasting its text with the texts of other sections of the statute: He fails to establish that the various verbal formulations employed in diverse sections of AEDPA reflect any of the differences in meaning he attributes to them, and he simply ignores the legislative aims and processes that produced such variations in the first place.

Consideration of the purposes of AEDPA confirms the plain meaning of section 2244(d)(2). AEDPA aims to "further the principles of comity, finality, and federalism," *Duncan v. Walker*, 121 S. Ct. 2120, 2127 (2001) (internal quotation marks omitted). Section 2244(d)(2) balances these principles: it gives prisoners an incentive to exhaust their state remedies by tolling the federal statute of limitations "while state remedies are being pursued," *id.* at 2128, and it promotes finality by according tolling only to "properly filed" applications for state collateral review, *id.* Here, the court of appeals' unanimous approach respects these goals by providing for a prompt, orderly, and proper use of the state courts prior to the filing of a federal habeas petition. The Warden's construction of section 2244(d)(2), in contrast, disserves the principles of federalism and comity by encouraging state prisoners either to file their federal habeas petitions prematurely to ensure that they do not exceed the one-year limitations period, or to rush through the state collateral review process in a way that is unlikely to afford the state courts a "full and fair" opportunity to pass on the prisoner's claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). The consequences of the Warden's construction would be particularly perverse in cases where the prisoner prevails in his state habeas petition at the trial court level, and the state seeks to appeal. Under the Warden's view, the limitations period would not be tolled even in that situation, thus penalizing the state prisoner for the time taken *by the state* to prepare its appeal and inducing the prisoner to file a federal petition to preserve his rights during that period of time. By encouraging premature recourse to federal court even where the state courts are apparently addressing the constitutional defects a petitioner complains about, the Warden's construction is particularly offensive to AEDPA's policy of not creating any "diminution of statutory incentives" to exhaust state remedies before proceeding to federal court. *Duncan*, 121 S. Ct. at 2128.

II. California does not have a system of conventional appeals through which a state habeas petitioner may seek appellate review of his petition. Instead, each principal level of court in California has original jurisdiction in habeas corpus, and the filing of successive petitions in the higher courts is the functional equivalent of filing appeals in those courts. Moreover, California law does not precisely specify the time for filing habeas petitions, whether in the superior court or in the higher courts. Rather, such petitions are subject to a gen-

eral requirement that they be filed "within a reasonable time." Accordingly, the time that a California prisoner spends seeking appellate review of his state habeas petition is time that his post-conviction proceedings are "pending" within the meaning of section 2244(d)(2), provided he seeks such review within a reasonable time.

III. Here, the Ninth Circuit correctly held that Mr. Saffold is entitled to tolling pursuant to section 2244(d)(2) for the entire period between the filing of his habeas petition in the state superior court and the issuance of the California Supreme Court's one-line order denying his petition to that court. In particular, the Ninth Circuit was correct to proceed on the basis that the four and one-half month interval between the state court of appeal's decision and the filing of his petition in the California Supreme Court did not render the petition untimely under California's requirement that such filings be made "within a reasonable time."

First, the Warden cites no rule establishing that the interval between the court of appeal's decision and the filing of Mr. Saffold's petition in the state supreme court was an "unreasonable" delay. Indeed, the California Supreme Court has adjudicated numerous petitions for habeas corpus filed many months after the court of appeal's decision on the merits, without giving any indication that such an interval caused the petition to be untimely. Second, the California Supreme Court's one-line order denying Mr. Saffold's petition "on the merits and for lack of diligence" did not clearly rule his petition to be out of time. The precise import of the court's reference to a "lack of diligence" is obscure. Third, the Ninth Circuit itself did not conclude that the California Supreme Court denied the petition for untimeliness. Rather, as the Ninth Circuit confirmed in a subsequent decision, the court in this case "viewed the California Supreme Court as having recognized the petitioner's use of post-conviction relief procedures to have been 'proper,' and thus within AEDPA's tolling provision." *Welch v. Newland*, 267 F.3d 1013, 1017,

(9th Cir. 2001), *mandate stayed*, 268 F.3d 1124 (9th Cir. 2001).

Given the absence of any fixed time limitation in California's collateral relief procedures, the ambiguity of the California Supreme Court's order in this case, and the undisputed fact that the California Supreme Court reached the merits of at least some of Mr. Saffold's claims, the Ninth Circuit was correct to proceed on the basis that Mr. Saffold's petition to the California Supreme Court was timely. This Court should not disturb the court of appeal's judgment on this issue, but should instead either defer to its analysis of state law, *see UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 368 (1999), or dismiss the writ as improvidently granted. At most, this Court should remand the case for further proceedings to determine conclusively whether Mr. Saffold's petition to the California Supreme Court was timely.

ARGUMENT

I. A STATE APPLICATION FOR COLLATERAL REVIEW IS "PENDING" UNDER 28 U.S.C. § 2244(d)(2) DURING THE TIME ALLOTTED BY STATE LAW FOR SEEKING APPELLATE REVIEW OF THE APPLICATION, IF SUCH REVIEW IS TIMELY SOUGHT.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, established a one-year statute of limitations for the filing of federal habeas corpus petitions by persons held in state custody. *See* 28 U.S.C. § 2244(d)(1).[4] AEDPA also provided that the limitations period shall be tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral

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[4] For prisoners, such as Respondent Saffold, whose convictions became final prior to AEDPA, the one-year limitations period began to run on April 24, 1996, the day AEDPA was enacted. *See Duncan v. Walker*, 121 S. Ct. 2120, 2130 & n.1 (2001) (Stevens, J., concurring in part and concurring in the judgment) (collecting court of appeals decisions so holding).

review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2). As this Court has observed, section 2244(d)(2)'s tolling provision contributes to AEDPA's general purpose of "'further[ing] the principles of comity, finality, and federalism.'" *Duncan v. Walker*, 121 S. Ct. 2120, 2127 (2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 436 (2000)). Specifically, it "promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued." *Id.* at 2128. It does so while also "limit[ing] the harm to the interest in finality by according tolling effect only to 'properly filed application[s] for State post-conviction or other collateral review.'" *Id.*

Every court of appeals to have considered the question has concluded that a state application for collateral review remains "pending" under section 2244(d)(2), and thus tolls the statute of limitations, from the time it is filed until the final disposition of any timely appeal relating to the application. *See Hizbullahankhamon v. Walker*, 255 F.3d 65, 72 (2d Cir. 2001); *Swartz v. Meyers*, 204 F.3d 417, 421-22 (3d Cir. 2000); *Taylor v. Lee*, 186 F.3d 557, 560-61 (4th Cir. 1999), *cert. denied*, 528 U.S. 1197 (2000); *Melancon v. Kaylo*, 259 F.3d 401, 406 (5th Cir. 2001); *Payton v. Brigano*, 256 F.3d 405, 408 (6th Cir. 2001), *petition for cert. filed*, No. 01-6749 (U.S. Oct. 5, 2001); *Fernandez v. Sternes*, 227 F.3d 977, 979-80 (7th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 883-84 (8th Cir. 1999); *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir. 1999); *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999); *Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000).[5] The Warden, however, now asks this Court to reject

[5] Neither *Tinker v. Moore*, 255 F.3d 1331 (11th Cir. 2001), nor *Painter v. Iowa*, 247 F.3d 1255 (8th Cir. 2001), cited by the Warden at Br. 16, is to the contrary. Unlike the instant case and the court of appeals cases cited in text, in those cases the one-year limitations period had already expired by the time the prisoners first filed their state petitions for collateral review. *See* 255 F.3d at 1334-35; 247 F.3d at 1256.

this approach and to announce a rule permitting tolling only while a state application for collateral review is actually before a court awaiting decision. Under the Warden's reading, the one-year limitations period could potentially expire before a prisoner has been able to exhaust his state remedies, even though the prisoner has pursued those remedies within the time provided by state law—or, as discussed below, even where the "delay" is occasioned by the Warden himself taking the time allocated by state law to file an appeal from a decision in the prisoner's favor. The Warden's reading is not only contrary to the unanimous position of the courts of appeals, it is also at odds with both the statutory text and its clear purpose of promoting the exhaustion of state remedies prior to federal review.

A. The Text of Section 2244(d)(2) Strongly Supports the Unanimous View of the Courts of Appeals That a State Application for Collateral Review Is Pending Until the Final Disposition of Any Timely Appeal.

Section 2244(d)(2) tolls the limitations period for "[t]he time during which a properly filed application for State . . . collateral review . . . is pending." Because Congress did not specifically define any of the terms in this section, they should be "construe[d] in accord with [their] ordinary or natural reading." *Smith v. United States*, 508 U.S. 223, 228 (1993); *see Williams v. Taylor*, 529 U.S. at 431. For present purposes, the analysis focuses principally on the word "pending," which the pertinent edition of Black's Law Dictionary[6] defines as "[b]egun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled, undetermined . . . . Awaiting an occurrence or conclusion of action,

[6] AEDPA was enacted in 1996. Accordingly, the Warden's reliance on the Seventh Edition of Black's Law Dictionary, published in 1999, is inappropriate. *See Molzof v. United States*, 502 U.S. 301, 307 (1992) (consulting "legal dictionaries in existence when the [statute] was drafted and enacted").

period of continuance or indeterminacy. . . ." *Black's Law Dictionary* 1134 (6th ed. 1990).[7] This definition, which "reflects the term's common usage," *Swartz*, 204 F.3d at 421, conveys the idea that an action's pendency encompasses the entire time until its final resolution, not just certain subsegments of that time during which the action is being reviewed by a particular court. Thus, the plain meaning of "pending" supports the conclusion that a "suit is pending until [any] appeal is disposed of." *Mackenzie v. A. Engelhard & Sons Co.*, 266 U.S. 131, 142-43 (1924); *see de Rodulfa v. United States*, 461 F.2d 1240, 1253 (D.C. Cir.) (same), *cert. denied*, 409 U.S. 949 (1972).[8]

This understanding is also consistent with the way in which "pending" has been construed in other contexts. A provision of the Clayton Act, for example, provides that the statute of limitations for private actions arising under the federal antitrust laws "shall be suspended during the pendency" of enforcement actions brought by the United States with respect to the same matter, and for one year thereafter. 15 U.S.C. § 16(i). Courts construing "pendency" in that context have consistently held that actions remain pending from the

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7 The Warden's attempt (Br. 24-25) to confine this general definition only to cases pending on direct review is unavailing. Although the finality of a criminal conviction is contingent on the completion of direct, rather than collateral, review, that fact in no way limits the circumstances in which a petition for post-conviction relief (as opposed to the conviction itself) is pending. Moreover, the definition of "pending" cited here contains no special limits or qualifications suggesting that it applies only in certain contexts. Rather, the definition applies fully to an action for post-conviction relief just as it does to the prior litigation that produced the underlying conviction.

8 Other definitions similarly reflect the view that "pending" refers to all the time until an action becomes definitively final and can no longer be continued. *See Webster's Third New International Dictionary* 1669 (1993) ("not yet decided: *in continuance*: in suspense") (emphasis added); *The Random House Dictionary of the English Language* 1065 (1966) ("remaining undecided; awaiting decision or settlement; *unfinished*") (emphasis added).

time they are first filed until the completion of all appeals (or, if no appeal is filed, until the expiration of the time to appeal). *See Monarch Asphalt Sales Co., Inc. v. Wilshire Oil Co. of Texas*, 511 F.2d 1073, 1078 (10th Cir. 1975); *Russ Togs, Inc. v. Grinnell Corp.*, 426 F.2d 850, 857 (2d Cir.), *cert. denied*, 400 U.S. 878 (1970); *Baldwin v. Loew's Inc.*, 312 F.2d 387, 391 (7th Cir. 1963); *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 857-58 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952). Similarly, a provision in the Balanced Budget Act of 1997 making certain amendments to the Social Security Act applicable to "pending" lawsuits has been construed to include "not only undecided cases at the District Court level," but also "every still-live dispute" that has not yet "completed its journey through the appellate process." *Beverly Cmty. Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1264-65 (9th Cir. 1997), *cert. denied*, 525 U.S. 928 (1998).[9] Moreover, in *Huffman v. Pursue*, 420 U.S. 592, 607-09 (1975), this Court held that *Younger* abstention, which directs federal courts generally not to hear cases that could interfere with certain "pending state court proceedings," 401 U.S. 37, 41 (1971), applies where a federal action is filed after the relevant state trial court has issued its judgment, but while there is still time under state law to file an appeal.

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9 The Warden's attempt (Br. 23-24) to distinguish *Beverly* and similar cases is unpersuasive. It is true, as the Warden observes, that *Beverly* implicated the well-established rule that Congress may, consistent with the Constitution, provide that changes in substantive law apply to cases pending on appeal. *See Hamling v. United States*, 418 U.S. 87, 101-02 (1974) (reciting the general rule). But the constitutional issue arose in *Beverly* only after the court concluded as a matter of statutory construction that Congress's reference to "pending" cases in the Balanced Budget Act of 1997 included not only cases awaiting decision at the district court level but also cases on appeal. *See* 132 F.3d at 1264. It is the substance of that statutory construction, not the constitutional question it raised, that is relevant here.

Every court of appeals to have construed this aspect of section 2244(d)(2) has done so in a manner consistent with the plain meaning of "pending" and with courts' consistent treatment of the term in other areas of the law. Those courts have unanimously concluded that the "sensible" reading is that a state petition "continues to be 'pending' during the period between one court's decision and a timely request for further review by a higher court." *Fernandez*, 227 F.3d at 980; *see Melancon*, 259 F.3d at 406 (collecting cases).[10] This Court should adopt that reading as well.

Congress's inclusion of certain other terms in section 2244(d)(2) confirms that the section is best read as tolling the statute of limitations continuously from the filing of a state application for collateral review until the final disposition of any timely appeals relating to the application. The statute refers to "[t]he *time* during which a properly filed *application* . . . is pending." 28 U.S.C. § 2244(d)(2) (emphasis added). It is significant that the statute uses the singular nouns "time" and "application"—rather than plural nouns such as "times" or "days" on one hand, or "application and appeals" or simply "applications," on the other. As a general matter, "time" can be "expressive both of a precise *point* or *terminus* and of an *interval* between two points." *Black's Law Dictionary* 1483 (6th ed. 1990); *see id.* ("A point in or space or duration at or during which some fact is alleged to have been committed."). Obviously, "an interval between two points," not a single point, is intended here. Such an interval plainly is a single continuous period (from the filing of the habeas petition through the resolution of all appeals), not a set of discontinuous periods (while matters are before different courts). *See Webster's Third New International Dictionary* 2394 (1993) (defining "time" as "a period during which something (as an action, process, or condition) exists or continues: an interval comprising a limited and continuous action, condition, or state of being . . . ."). Moreover, the statute's reference to a singular "application" reinforces the sense that it is a *single* thing (full litigation of an "application")—not several distinct things (distinct trial court, appellate court, and state supreme court proceedings on "applications")—that tolls the one-year limitations period. Thus, a single "application" remains "pending" during the continuous "time" from its filing to its final disposition on appeal.[11]

Warden Newland attempts (Br. 27-28) to bolster his narrow construction of the tolling provision by pointing to the different language that Congress used in 28 U.S.C. § 2263(b)(2), the parallel tolling provision applicable in capital cases in so-called "opt-in" states that have met certain conditions regarding the appointment of post-conviction counsel. Section 2263(b)(2) provides that the limitations period in such cases is tolled "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition." *Id.* The Warden contrasts this language to the text of section 2244(d)(2) and draws the negative inference that Congress did not intend tolling under section 2244(d)(2) to extend as

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10 There is some disagreement among the courts of appeals over whether a petition also continues to be pending during the time allowed for appeal under state law if no appeal is ultimately filed. *Compare, e.g.*, *Swartz*, 204 F.3d at 424 (finding that tolling applies in that circumstance), *with Fernandez*, 227 F.3d at 980 (suggesting that tolling is not available in such cases). That question is not implicated here: all of the time to be tolled in this case corresponds to Respondent Saffold's active use of the California appellate courts.

11 *Amici* the State of North Carolina *et al.* simply ignore the language of the statute in the course of arguing (Br. 8) that "no 'application' is pending between the date the application is denied [by the trial court] and the date appellate review is sought." If, as *amici* suggest, Congress viewed an appeal as a separate "application (*i.e.*, a document requesting relief)," *id.* at 8, then one would have expected Congress to use the plural form of the word ("applications") to refer to the habeas petition and subsequent appeals, rather than the singular. But Congress did not choose that form of the word, and the flaw in *amici*'s argument on this point is dramatized by their own misquoting of the statute as referring to "'pending' '*applications*.'" *Id.* at 9 (emphasis added).

broadly as under section 2263(b)(2). That argument is unpersuasive, for several reasons.

First, as this Court has observed, AEDPA's various provisions are hardly a model of textual consistency. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("[I]n a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting."). Accordingly, the mere presence of differing verbal formulations in parallel provisions of the statute does not necessarily compel the conclusion that the provisions have different meanings.[12]

Second, this is not a case in which the kind of negative inference sought by the Warden is most appropriate. "[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Id.* at 330; *see Field v. Mans*, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference . . . ."). Here, in contrast, there is no evidence in the legislative record that the texts of sections 2244(d)(2) and 2263(b)(2) ever started out the same, or that there is anything deliberate in the textual difference between the two sections. To the contrary, AEDPA placed the two tolling provisions in two entirely separate chapters of Title 28 (chapter 153 for section 2244(d)(2); chapter 154 for section 2263(b)(2)), and those two chapters "beg[a]n life independently and in different Houses of Congress." *Lindh*, 521 U.S. at 330.

Third, the Warden cannot point to any plausible legislative purpose that might be served by construing section

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12 For example, section 2263(b)(2) refers to a "petition" for collateral review, while section 2244(d)(2) uses the term "application." Similarly, section 2244(d)(2) states that certain time "shall not be counted," while section 2263(b) states that certain time requirements "shall be tolled." There is no indication, or reason to believe, that Congress meant these terms to have different meanings.

2263(b)(2) more broadly than section 2244(d)(2). As a general matter, section 154 of Title 28 (of which section 2263(b)(2) is part) establishes "special rules *favorable to the state party*" in capital cases, in return for the state's agreement to provide for the appointment of post-conviction counsel in such cases. *Id.* at 327 (emphasis added); *see* 28 U.S.C. § 2261(a)-(c) (setting the conditions of chapter 154's applicability); H.R. Rep. No. 104-23, at 10 (1995) (describing chapter 154's "quid pro quo arrangement"). To construe section 2263(b)(2) as more favorable *to the prisoner* than section 2244(d)(2) would thus turn chapter 154's purpose on its head: Rather than providing states with an incentive to provide counsel in state post-conviction proceedings, section 2263(b)(2) would put states in a worse position with respect to the statute of limitations (by providing for a broader tolling period) than under the general tolling provision contained in section 2244(d)(2).

Finally, it bears noting that, as just described, section 2263(b)(2) is necessarily triggered only in cases where the state prisoner is guaranteed representation in state post-conviction proceedings. *See* 28 U.S.C. § 2261(a)-(c). But because there is no general federal right to counsel in habeas proceedings, a great many cases subject to section 2244(d)(2) may involve *pro se* prisoners. If section 2263(b)(2) were understood to establish a more generous tolling rule than section 2244(d)(2), the statute would have the anomalous effect of requiring *pro se* prisoners to understand and comply with a more strict tolling rule than the one applicable to prisoners represented by counsel. Such a result would be contrary to this Court's "admonition" that habeas procedures should not be used to "trap the unwary *pro se* prisoner," *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (internal quotation marks omitted), and should therefore be avoided.

Ultimately, there is no reason to read section 2244(d)(2) in a manner inconsistent with its most natural and most "sensible" meaning. Section 2244(d)(2) and section 2263(b)(2) mean the same thing, the first by using a term—"pending"—

and the second by using the standard definition of that term. It makes no sense to propose that by employing both a standard term and its conventional definition, AEDPA somehow changed the former.[13] As every court of appeals to have addressed the issue has concluded, the plain text of section 2244(d)(2) is best read as tolling all of the time between the filing of a state application for collateral review and the final disposition of any timely appeal relating to that application.

B. Consideration of the Purposes of AEDPA and Section 2244(d)(2) Reinforces the Plain Meaning of the Text.

Consideration of AEDPA's purposes confirms that section 2244(d)(2) is properly construed as tolling the statute of limitations for the entire period between the filing of an application for state collateral review and the final disposition of any timely appeals. In general, AEDPA aims to "'further the principles of comity, finality, and federalism.'" *Duncan*, 121 S. Ct. at 2127 (quoting *Williams*, 529 U.S. at 436). The Warden's narrow construction of section 2244(d)(2) disserves those purposes, while the construction advocated here and adopted unanimously by the courts of appeals reinforces them.

AEDPA's interests in comity and federalism are principally served by the requirement contained in 28 U.S.C.

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[13] The Warden is also unpersuasive in his attempt (Br. 28-29) to make the same point by contrasting section 2244(d)(2) with 28 U.S.C. § 2244(d)(1)(A), which establishes the point at which the limitations period generally begins to run. *See* 28 U.S.C. § 2244(d)(1)(A) ("The limitation period shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . ."). Unlike section 2244(d)(2), which uses the term "pending" in its ordinary sense to refer to the ongoing status of a case, section 2244(d)(1)(A) identifies a discrete point in time: "the date on which the judgment became final." Thus, the two provisions have fundamentally different purposes, and there is no reason to infer that the text of section 2244(d)(1)(A) in any way alters the common meaning of "pending" as used in section 2244(d)(2).

§ 2254(b) that state prisoners exhaust their state remedies before pursuing federal habeas remedies. *See Duncan*, 121 S. Ct. at 2127-28 (explaining that the exhaustion requirement "ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment"); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("[T]he exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts"); *Picard v. Connor*, 404 U.S. 270, 275 (1971) (the exhaustion requirement "reflects a policy of federal state comity"). The interest in finality, in turn, is served by section 2244(d)(1)'s one-year statute of limitations. *See Duncan*, 121 S. Ct. at 2128 (the limitations provision "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review"). Properly construed, section 2244(d)(2) "balances the interests served by the exhaustion requirement and the limitation period." *Id.* Specifically, it "limits the harm to the interest in finality by according tolling effect only to 'properly filed application[s] for . . . collateral review,'" while at the same time promoting exhaustion by "protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued." *Id.*

The pursuit of these aims—encouraging exhaustion of state remedies and preserving the finality of state court judgments—reflects AEDPA's focus on "address[ing] a number of problems . . . in *federal* court criminal litigation," especially "the lengthy delays in filing that now often occur in *federal* habeas corpus litigation." H.R. Rep. No. 104-23, 9 (1995) (emphasis added). That is, AEDPA's statute of limitations and tolling provision are, like AEDPA's other habeas reforms, aimed at streamlining the *federal* habeas procedures by encouraging prisoners first to make full use of available state procedures and then spurring them "to seek federal ha-

beas review in a timely manner." *Id.* But nothing in the purposes animating AEDPA reveals any congressional purpose to truncate the pursuit of *state* post-conviction relief prior to seeking federal habeas review. To the contrary, AEDPA aims to encourage the exhaustive pursuit of state remedies so that the federal intrusion into state criminal cases may be minimized.

In *Duncan*, this Court declined to adopt a reading of section 2244(d)(2) that it concluded would disserve AEDPA's purpose to promote the exhaustion of state remedies. Specifically, the Court rejected an argument that the provision tolls the statute of limitations during the pendency of *federal* habeas petitions, in part because such a construction "would furnish little incentive for individuals to seek relief from the state courts before filing federal habeas petitions." *Id.* Conceding that "other statutory provisions, such as § 2254(b) itself . . . would still provide individuals with good reason to exhaust" their state remedies no matter how section 2244(d)(2) was interpreted, *Duncan* nevertheless refused to construe section 2244(d)(2) in a manner that would at all diminish the "statutory incentives to proceed first in state court." *Id.* Any diminution in those incentives, the Court reasoned, would "increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Id.* Finally, and crucially for present purposes, the Court held that even if tolling the statute of limitations during the pendency of federal habeas petitions "would further Congress' goal to spur defendants to file their federal habeas petitions more quickly," such tolling was unacceptable because it "fail[ed] to account sufficiently for AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Id.* at 2129.

Here, the Warden's construction of section 2244(d)(2) should be rejected for the same reasons. In order to meet the exhaustion requirement, prisoners generally must "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. Interpreting the statute to permit tolling only while a state petition is actually before a court awaiting decision would compromise the interest in exhaustion in at least two ways. First, it would force prisoners to file state appeals prematurely, without taking sufficient time to articulate their claims fully and in a manner susceptible to "full and fair" review by the state courts. *Id.* For example, although "a transcript [of the trial court habeas proceedings] is often a necessary part of the trial court record filed for appellate review," the state is generally responsible for the preparation of that transcript and "the time required . . . to prepare and deliver the transcript is a matter completely out of a prisoner's control." *Taylor*, 186 F.3d at 561. Under the Warden's construction of section 2244(d)(2), however, a state prisoner may be forced to choose between waiting to receive the trial transcript while the federal statute of limitations continues to run, and filing an appeal in the state court without the benefit of the transcript. Neither course is faithful to the exhaustion doctrine: the former would effectively impose a federal penalty on state prisoners who use the time allocated under state law to prepare comprehensive state appeal papers; the latter would diminish state courts' ability to engage in meaningful collateral review, thus raising the "unseem[ly]" specter of "a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *O'Sullivan*, 526 U.S. at 845.

Second, the Warden's construction of section 2244(d)(2) would generate piecemeal litigation by encouraging prisoners to file "protective" petitions in federal court prior to the completion of state collateral review, to ensure that their federal petitions are filed within the statute of limitations. *See Melancon*, 259 F.3d at 406 ("If the time [after] a disposition but before a timely filed appeal is not tolled, a habeas petitioner is likely to file a protective federal petition before he has fully exercised all state appeals if there is a possibility that

the right to federal habeas might be extinguished."); *Nino*, 183 F.3d at 1005 (a narrower construction of section 2244(d)(2) "would inevitably lead to the filing of protective federal petitions"). To be sure, nothing in AEDPA prohibits a federal district court from "retain[ing] jurisdiction over a meritorious claim and stay[ing] further proceedings pending the complete exhaustion of state remedies. Indeed, there is every reason to do so . . . when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period." *Duncan*, 121 S. Ct. at 2130 (Stevens, J., concurring in part and concurring in the judgment); *see Neverson v. Bissonnette*, 261 F.3d 120, 126 n.3 (1st Cir. 2001) (identifying circumstances where a stay is appropriate); *Zarvela v. Artuz*, 254 F.3d 374, 380-82 (2d Cir.) (same), *cert. denied*, 122 S. Ct. 506 (2001); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000). But the fact that such a procedure is *permissible* under AEDPA does not mean that section 2244(d)(2) should be construed to *encourage* it. Rather, section 2244(d)(2) should be construed to avoid any "diminution of statutory incentives to proceed first in state court" and to minimize the "risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Duncan*, 121 S. Ct. at 2128.[14]

The incompatibility of the Warden's argument with the purposes of the statute—and the anomalous consequences his reading would generate—is particularly acute in cases in which a prisoner *wins* his state habeas case in a lower state court. Under the Warden's construction of section

[14] As Justice Powell explained in testimony before Congress, the exhaustion requirement "represents appropriate respect for federalism—a state court system should have an opportunity to address any errors on its own before intrusion by the federal system." *Habeas Corpus Legislation: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 79 (1990) (testimony of Justice Lewis F. Powell, Jr.). Justice Powell thus recommended against adopting any rule that would "weaken the exhaustion requirement" by "promot[ing] piecemeal litigation." *Id.*

2244(d)(2), if a higher state court were eventually to reverse the grant of habeas relief, the time taken *by the state* to prepare its timely appeal would not toll the federal statute of limitations. There would be nothing the prisoner could do in state court to stop the running of the statute during that time, because there would be no appeal for him to file. The state, on the other hand, could substantially decrease, or even eliminate, the prisoner's federal limitations period simply by using all of the time allowed under state law for filing its appeal.[15] As a consequence, to protect his federal rights, a cautious and informed *pro se* prisoner who *won* his case in state court could be compelled nevertheless to attempt to file a federal habeas petition while the state appellate process went forward. If such a federal petition were rejected as unripe or if a prisoner did not file in federal court while the state appealed his lower court victory, the prisoner might simply lose his federal rights in a case facially meritorious enough to persuade at least one state court to rule in his favor. Section 2244(d)(2) surely does not require such a result. *Cf. Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) (avoiding a construction of AEDPA that would have "far reaching and seemingly perverse" implications).

Thus, the Warden's construction of section 2244(d)(2) in this case disserves the exhaustion doctrine by compromising the integrity of the state appeal process, by encouraging pre-

[15] On this point, the Warden has apparently abandoned the position taken by California's Attorney General when AEDPA was under consideration in the Congress. *See Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process, Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 146 (1995) ("[W]e all agree that the petitioner should not be punished [by having the statute of limitations continue to run] for delay beyond his or her control.") (statement of California Attorney General Daniel E. Lungren). *Amicus* the Criminal Justice Legal Foundation also evidently disagrees with the Warden on this point. *See* Br. 10 ("Congressional intent [in enacting the limitations provision] does not include punishing petitioners for delays *beyond their control*.") (emphasis in original).

mature filings in federal court, and by causing uncertainty and unfairness when the state is the appellant in its own courts. In contrast, interpreting section 2244(d)(2) to toll the statute of limitations throughout the state collateral review process is entirely consistent with the exhaustion requirement. It "promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued," *Duncan*, 121 S. Ct. at 2128, and it minimizes the chance of premature federal court filings by assigning no adverse consequences to a prisoner's—or the state's—full and timely use of the state appellate process. This reading thus best comports with "the goals of comity and federalism that the exhaustion requirement serves." *Id.* at 2129; *see Rose v. Lundy*, 455 U.S. 509, 518 (1982) (the exhaustion requirement is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings").

The Warden nevertheless insists (Br. 39) that his narrower construction of section 2244(d)(2) serves AEDPA's purpose of "requiring state prisoners to pursue state collateral review without unnecessary delay." This argument is misconceived. It is true, as noted above, that AEDPA—and in particular section 2244(d)(1)'s one-year limitations period—serves "the well-recognized interest in the finality of state court judgments" by "restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 121 S. Ct. at 2128. It is crucial to recognize, however, that the interest in finality is the *state's*, not the federal government's. *See Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998); *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) (noting the "State's interest in the 'finality' of its own legal processes.") (quoting *Withrow v. Williams*, 507 U.S. 680, 698 (1993) (O'Connor, J., concurring in part and dissenting in part)); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). Thus, if the Warden's insistence on the need to avoid unnecessary delay has any purchase in this context, it must refer to the state's interest in avoiding "delay on the road to finality." *Duncan*, 121 S. Ct. at 2128.

Viewed in this light, however, the Warden's position simply makes no sense. The essence of his argument is that "allow[ing] additional tolling based upon time periods permitted under state law [for appealing state court decisions] would open the door for state procedural laws and rules to in effect trump the federal statute of limitations." Br. 31. But because it is *the state's laws* that provide the time to appeal within the state system, no cognizable state interest is violated by tolling the federal statute during that time. The Warden's insistence to the contrary appears premised either on the notion that there is a *federal* interest in the finality of state court judgments that somehow trumps the interest of the states with respect to those judgments, or on the idea that a state's laws allocating time to appeal within its court system are somehow antithetical to the state's own interests. Both of those premises are unsound, at radical variance with the principles of comity that underlie the statute, and without any foundation in this Court's federal habeas jurisprudence. *Cf. Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (emphasizing "the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus").[16]

The Warden's assertion (Br. 48) of the need for a "uniform national rule" regarding tolling under section

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[16] The approach of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases ("Powell Committee"), chaired by Justice Powell, is instructive in this regard. The Powell Committee's proposals for federal habeas reform, upon which many of AEDPA's provisions were based, never once suggested that there is a federal interest in the finality of state criminal cases that is separate from—much less superior to—the interests of the relevant state. Rather, the Powell Committee spoke only of the "state interest in the finality of criminal convictions and capital sentences." Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal ("Powell Committee Report") 11 (Aug. 23, 1989).

2244(d)(2) is similarly unavailing. Determining what it means for an application to be "pending" under the statute is a matter of federal law, *see*, *e.g.*, *Mills*, 187 F.3d at 883 (definition of "pending" is "an issue of federal law"), and in that sense any determination made by this Court on this issue will certainly establish a uniform national rule. The Warden, however, appears to suggest that section 2244(d)(2) must be construed so that the actual length of tolling is somehow "uniform" from case to case, and in no way affected by differences in state law. But the Warden fails to identify any textual or other evidence that section 2244(d)(2) is meant to operate that way. Indeed, the Warden's argument on this point is at odds with AEDPA's purpose of "further[ing] the principles of comity, finality, and federalism," *Duncan*, 121 S. Ct. at 2127 (internal quotation marks omitted), which require respecting the particularized interests and policy judgments of individual states. Rather than creating a uniform tolling period for all cases, section 2244(d)(2) is best interpreted as respecting these principles by dictating explicitly that the limitations period is tolled for the "time during which a properly filed application . . . is pending," but by refraining from interfering with individual states' respective judgments about how long an application may remain pending during the interval between one state court's decision and the filing of an appeal at the next level.[17] That indeed is the "uniform

[17] The Warden's reading of the statute would not achieve national uniformity in tolling periods in any event. Substantial empirical evidence confirms that the amount of time state applications for collateral review sit before state courts awaiting decision (time that the Warden concedes is tolled under section 2244(d)(2)) varies widely both from state to state and from case to case within individual states. *See* Fred Cheesman *et al.*, *Caseload and Timeliness in State Supreme Courts*, 7 Caseload Highlights (Dec. 2001) (reporting significant variations in case processing time for discretionary writs in five representative states, both from state to state and between granted writs and denied writs within individual states). This wide variation ensures that section 2244(d)(2), even construed as the Warden would have it, cannot possibly achieve the national uniformity he seeks.

national rule" already applied by all federal courts of appeals to have addressed the issue.

II. THE STATUTE OF LIMITATIONS SHOULD BE TOLLED FROM THE TIME A CALIFORNIA PRISONER FILES A HABEAS PETITION IN STATE SUPERIOR COURT UNTIL FINAL DISPOSITION OF A TIMELY PETITION TO THE CALIFORNIA SUPREME COURT.

In California, state prisoners typically pursue post-conviction relief by filing an original petition for a writ of habeas corpus in the state superior court, and, if the petition is denied, by seeking appellate review through the filing of new original petitions in the court of appeal and state supreme court. This system of successive original writs is the functional equivalent of an appellate system. Accordingly, the time that a California prisoner spends seeking timely appellate review of his petition for post-conviction relief is time that his post-conviction proceedings are "pending" within the meaning of section 2244(d)(2), just as applications for post-conviction relief in other states are "pending" until the final disposition of any timely appeals relating to those applications.

A. California's System of Original Writs Functions Like an Appellate System.

Historically, the default rule in American courts was that an order denying habeas relief was not directly appealable. Instead, a petitioner could obtain appellate consideration of his claims by filing a new petition in a higher court. *See* Br. of *Amicus* Criminal Justice Legal Foundation 11 (citing W. Church, *Habeas Corpus* §§ 386, 389 (2d ed. 1893)). Such successive petitions functioned as appeals. Indeed, this Court historically treated original petitions for habeas corpus as requests that the Court exercise its "appellate power" to review the decisions of lower courts. *Ex parte Siebold*, 100 U.S. 371, 374 (1879); *see, e.g.*, *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 97-100 (1868); *Ex parte McCardle*, 73 U.S. (6 Wall.)

318, 324 (1867); *Ex parte Bollman*, 8 U.S. (4 Cranch.) 75, 100-01 (1807); *see also* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.2, at 8-9 & n.5 (3d ed. 1998) (collecting cases). Since the nineteenth century, the overwhelming majority of states have enacted statutes permitting prisoners to file direct appeals of the denial of their state habeas petitions.[18]

California has chosen largely to retain its traditional system of original writs. Like the federal system of an earlier day, however, an integral part of that system is the practice whereby a non-capital petitioner, such as Mr. Saffold, files for post-conviction relief initially in the superior court and proceeds up the judicial ladder by original writ seeking appellate review of lower court decisions denying relief.

The California Constitution, which guarantees the writ of habeas corpus, Cal. Const. art. I, § 11, also provides that the California Supreme Court, the courts of appeal, and the various superior courts all have original jurisdiction in habeas corpus proceedings, *id.* art. VI, § 10. It is well established, however, that habeas petitions seeking post-conviction review are most appropriately filed in the superior court in the first instance, and a prisoner who does not comply with this preference risks dismissal of his petition. *See In re Ramirez*, 108 Cal. Rptr. 2d 229, 232 (Cal. Ct. App. 2001) ("[T]his court has discretion to refuse to issue the writ as an exercise

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18 *See, e.g.*, Ala. Code § 12-22-90 (1975); Ariz. R. Crim. P. 32.9(g); Conn. Gen. Stat. § 52-470(b); Fla. Stat. Ann. § 924.059(5); 725 Ill. Comp. Stat. Ann. 5/122-7 (Smith-Hurd); Me. Rev. Stat. Ann. tit. 15, § 2131; Mass. R. Crim. P. 30(g); Minn. Stat. Ann. § 589.29; Miss. Code Ann. § 11-43-53; Nev. Rev. Stat. 34.575; N.J. Stat. Ann. § 2A:67-36; N.Y. C.P.L.R. 7011; 42 Pa. Cons. Stat. Ann. §§ 9541-9546; Tenn. Code Ann. § 29-21-127; Va. Sup. Ct. R. 5:17. *But see, e.g., Triplett v. Deputy Warden*, 371 N.W.2d 862, 866 (Mich. App. 1985) (superior court denial of habeas petition may not be appealed, but prisoner may file an original petition in court of appeal); *Charest v. Howard*, 285 A.2d 381, 386 n.7 (R.I. 1972) (superior court denial of habeas petition may not be appealed, but prisoner may file an original petition in supreme court).

of original jurisdiction on the ground that application has not been made therefor in a lower court in the first instance.") (citing *In re Hillery*, 20 Cal. Rptr. 759, 760 (Cal. Ct. App. 1962)); *Harris v. Superior Court*, 500 F.2d 1124, 1126 (9th Cir. 1974) ("California appellate courts may refuse to entertain habeas corpus petitions where no previous application for such relief has been made in the Superior Court."), *cert. denied*, 420 U.S. 973 (1975). Indeed, "[i]t is a general policy of reviewing courts not to issue an extraordinary writ unless an application for the writ or other appropriate relief has first been made in a lower court, or some unusual circumstances make it proper to apply to the reviewing court in the first instance." *See* B. Witkin & N. Epstein, 6 *California Criminal Law: Criminal Writs* § 20, at 540 (3d ed. 2000).[19]

Because neither the courts of appeal nor the California Supreme Court is equipped to conduct evidentiary hearings, it makes practical sense that habeas petitions, particularly those requiring the development of additional facts, first be filed in superior court. *See People v. Baker*, 253 Cal. Rptr. 615, 618 n.2 (Cal. Ct. App. 1988). Thus, even if an appellate court does not exercise its discretion to dismiss a state habeas petition filed for the first time in that court, it will often redirect the case to superior court for factual development by issuing an order to show cause returnable to the superior court. *See* Cal. Penal Code § 1508(a)-(b); Cal. R. Ct. 56(a)(1); *In re Hochberg*, 471 P.2d 1, 4 n.2 (Cal. 1970), *rejected on other grounds*, *In re Fields*, 800 P.2d 862 (Cal. 1990); *In re Elias*, 25 Cal. Rptr. 739, 740 (Cal. Ct. App. 1962); *In re Hillery*, 20 Cal. Rptr. at 760.[20] This procedure "effectively transfers the

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19 This preference for filing first in the lower court has been incorporated into a court rule providing that "[i]f the petition might lawfully have been made to a lower court in the first instance, [the petition] shall set forth the circumstances that, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court." Cal. R. Ct. 56(a)(1).

20 The appellate courts also have a procedure whereby a referee is appointed to find facts and report to the reviewing court in writing. *See In*

proceeding to the superior court." *People v. Romero*, 883 P.2d 388, 393 (Cal. 1995). The superior court has the exclusive power to decide the case, just as if the case had been filed in the superior court in the first instance. *Id.*

If a prisoner is granted relief in the superior court, the state may seek appellate review by straightforward appeal to the court of appeal, even if the superior court order is on the return of a writ of habeas corpus from the court of appeal or the supreme court. *See* Cal. Penal Code § 1506; *In re Crow*, 483 P.2d 1206, 1212 (Cal. 1971). As with any direct appeal, the party that loses in the court of appeal may seek additional review by filing a petition for review in the California Supreme Court. *See* Cal. Penal Code § 1506; *see also, e.g., In re Earley*, 534 P.2d 721, 723 (Cal. 1975); *In re Walker*, 518 P.2d 1129, 1132 (Cal. 1974).

A prisoner has no equivalent right of direct appeal from the superior court's denial of all or part of his habeas petition. *See People v. Garrett*, 79 Cal. Rptr. 2d 803, 805 (Cal. Ct. App. 1998). Instead, a petitioner may seek the court of appeal's review by filing a new habeas petition with that court, which has original jurisdiction in habeas corpus matters. *See* Cal. Const. art. VI, § 10; *In re Reed*, 663 P.2d 216, 217 n.2 (Cal. 1983). When a prisoner, instead of filing a new writ, purports to "appeal" from the superior court's denial, a reviewing court may in its discretion choose to treat the filing as a new petition and review it on the merits. *See People v. Gallardo*, 92 Cal. Rptr. 2d 161, 164 (Cal. Ct. App. 2000).

If the court of appeal denies the relief sought in a renewed petition for habeas corpus, the prisoner may seek the

re Weber, 523 P.2d 229, 231 (Cal. 1974); *In re Hochberg*, 471 P.2d at 4 n.2. The California Supreme Court often uses a referee to develop the factual record in death penalty cases. *See, e.g., In re Gay*, 968 P.2d 476, 480 (Cal. 1998), *In re Johnson*, 957 P.2d 299, 300-01 (Cal. 1998); *In re Visciotti*, 926 P.2d 987, 989 (Cal. 1996), *cert. denied*, 521 U.S. 1124 (1997). The procedure is less frequently used in non-capital cases. *See* J. Bradley O'Connell, *The Uncharted World of Non-Capital State Habeas Corpus Practice*, Cal. Crim. Def. Prac. Rep. 637, 645 (Oct. 1998).

California Supreme Court's review by filing either a petition for review, *see* Cal. Penal Code § 1506, or another original petition, *see In re Clark*, 855 P.2d 729, 740 n.7 (Cal. 1993); *In re Catalano*, 623 P.2d 228, 232 (Cal. 1981). Where, as here, the court of appeal denies the petition by summary order, its denial generally becomes final immediately and the prisoner must file a petition for review within ten days of the date of the order. *See* Cal. R. Ct. 24(a), 28(b). Original petitions are not subject to that deadline, but instead must be filed "within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis for the claim." *In re Harris*, 855 P.2d at 398 n.7.[21]

Appellate review on original writ resembles more conventional appellate review in a number of respects. The standard of review is identical to the standard used in cases where the court reviews the case following the report of a referee who submitted his findings to the court. *See In re Fountain*, 74 Cal. App. 3d 715, 717-18 (Cal. Ct. App. 1977). Legal questions and mixed questions of law and fact are subject to "independent review." *In re Hitchings*, 860 P.2d 466, 471-72 (Cal. 1993). And while the superior court's factual

21 Although a petitioner may file either a petition for review or an original petition in the California Supreme Court, an original petition is often a more appropriate vehicle, particularly from a summary denial unaccompanied by written opinion. The Warden's assertion (Br. 25) that a petition for review is "strongly preferred" relies upon a misconstruction of *In re Michael E.*, 538 P.2d 231 (1975), which was itself cited by the Ninth Circuit in *Nino*. In *In re Michael E.*, the California Supreme Court granted the prisoner's petition for a writ of habeas corpus. *Id.* at 237. In so doing, the court also explained that, in cases where the court of appeal issued a published opinion (as it did in that case), the California Supreme prefers to consider the matter on petition for review. *Id.* at 237 n.15. Such considerations do not apply here, because the court of appeal summarily denied the petition without opinion. *See* J.A. 30. And in any event, the Warden cites no case even suggesting that a court's "preference" in this regard has any bearing on the availability of merits review on a habeas petition filed in the California Supreme Court.

findings are not binding on the reviewing court, the court gives great weight to findings that are supported by "'ample, credible evidence' . . . or 'substantial evidence'." *People v. Ledesma*, 729 P.2d 839, 869 (Cal. 1987) (quoting *In re Branch*, 449 P.2d 174, 176, n.1 (Cal. 1969)).

Moreover, this Court has treated California's system of review by successive original writs as the functional equivalent of an appellate system. In *Gardner v. California*, 393 U.S. 367 (1969), for example, the Court concluded that a prisoner seeking to pursue his habeas remedy in the higher courts following the superior court's denial of his petition was entitled to a free transcript of the superior court proceedings, just like a conventional appellant. This was because there were strong similarities between a habeas petition to a higher court and an appeal: The new petition must "reflect[] what transpired in superior court," *id.* at 368, and the petitioner "carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal conclusions from the facts deduced were erroneous," *id.* at 370.[22]

In sum, the common practice in California of seeking post-conviction appellate review by filing original petitions in the court of appeal and the California Supreme Court is the functional equivalent of filing formal appeals. An appeal is commonly understood as "a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority;

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22 Additionally, federal courts sometimes treat the California Supreme Court's consideration of an original habeas petition as a review of the decision of the court of appeal, rather than a *de novo* adjudication of the case. For instance, the Ninth Circuit treats California Supreme Court petitions denied without comment as procedurally barred, if the court of appeal had previously denied the same claims on procedural grounds. *See Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). This practice is based on a presumption that where "the last reasoned opinion on the claim explicitly imposes a procedural default . . . a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal." *Black's Law Dictionary* 94 (7th ed. 1999); *see also Black's Law Dictionary* 96 (6th ed. 1990). California's system clearly fits this definition. Accordingly, the interpretation of section 2244(d)(2) advocated above—that an application for state collateral review remains "pending" from the time it is first filed until the final disposition of any timely appeals—should apply equally to the California system, and section 2244(d)(2) should toll the federal limitations period for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." *Nino*, 183 F.3d at 1006 (citation omitted).

B. Tolling the Federal Limitations Period While a California Prisoner Properly Pursues Appellate Review of His State Habeas Petition Accords with the Purposes of Section 2244(d)(2) and AEDPA.

The principles of comity, finality, and federalism that AEDPA seeks to further, *see Duncan*, 121 S. Ct. at 2127, are bolstered by applying the interpretation of section 2244(d)(2) advocated above to California prisoners who timely file habeas petitions in the state appellate courts as a means of seeking review of their case.

In contrast, as the Warden appears to acknowledge, his construction of section 2244(d)(2) would encourage California prisoners to forgo full state post-conviction review by "by-passing the superior and/or appellate courts and instead filing [their] original petition[s] directly with the California Supreme Court." Br. 26. The fact that the Warden's construction would encourage prisoners to proceed in this fashion is powerful evidence of the conflict between his interpretation and the principles of comity and federalism underlying the statute. AEDPA's exhaustion requirement is designed to serve those principles by "giv[ing] the state courts a full and fair opportunity to resolve federal constitutional claims be-

fore those claims are presented to the federal courts." *O'Sullivan*, 526 U.S. at 845. Asking a state supreme court to adjudicate a habeas petition without the benefit of any lower court proceedings to develop the facts and sharpen the legal issues hardly affords the state courts a "full and fair opportunity" to resolve the issues.[23] Rather, it minimizes the state supreme court's chances of identifying and remedying any constitutional error in the case. This result cannot be squared with the principles of comity and federalism animating AEDPA's exhaustion requirement. *See id.* (emphasizing need to avoid the "unseem[liness] of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance.") (internal quotation marks omitted).

California has chosen not to specify precise times for the pursuit of state collateral review at the appellate level. Rather, it has determined that original habeas petitions filed in the state court of appeal or supreme court are subject only to the general requirement that they be filed "within a reasonable time." *In re Harris*, 855 P.2d at 398 n.7. Accordingly, tolling AEDPA's statute of limitations while a California prisoner's habeas petition is "pending" in the California courts requires tolling the statute until the final disposition of

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[23] Indeed, there is a serious question whether a single filing in the state supreme court would satisfy the requirement that a petitioner "give the state courts one full opportunity to resolve any constitutional issues by invoking *one complete round* of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845 (emphasis added). In *O'Sullivan*, that requirement obliged the prisoner to "use the State's established appellate review procedures before he present[ed] his claims to a federal court." *Id.* If that requirement applies here, the filing of a single petition in the California Supreme Court may not suffice to exhaust the remedies available under California law. Moreover, even if such a filing could satisfy the exhaustion requirement in theory, in practice it may not suffice if the California Supreme Court denies the petition with leave to file in the superior court, or redirects the case to the superior court by issuing an order to show cause returnable to the lower court. *See, e.g., Leftwich v. Coiner*, 424 F.2d 157, 160-61 (4th Cir. 1970).

the petition by the state supreme court, provided that court's review was sought "within a reasonable time." Only by construing section 2244(d)(2)'s tolling provision in this fashion will this Court accord California "the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Coleman*, 501 U.S. at 726.[24]

Amicus the Criminal Justice Legal Foundation invites this Court to disregard California's choice to permit the pursuit of habeas review "within a reasonable time," and to impose on California habeas petitioners a set of appellate filing requirements imported from other legal and procedural contexts. *See* Br. 19-23. That invitation should be rejected. *Amicus* does not—and could not—identify any congressional intent in section 2244(d)(2) to ignore a state's timing rules for seeking appellate habeas review in favor of other filing rules developed in other legal contexts. Indeed, to do that here would fail entirely to accord California the "respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Coleman*, 501 U.S. at 726. AEDPA was enacted out of a recognition of the need for such respect, and its provisions should not be construed in a fashion so wholly at odds with that purpose. Rather, section 2244(d)(2) should be

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[24] Contrary to the Warden's suggestion (Br. 18-19), this reading of section 2244(d)(2) does not dictate any particular outcome in cases such as *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001). In *Welch*, the Ninth Circuit held that a prisoner's application for collateral review was "pending" for the four years between the superior court's decision and the filing of a petition in the California Supreme Court, even though the two petitions raised entirely different claims. *See id.* at 1015, 1017-18. Here, in contrast, Mr. Saffold's petition to the California Supreme Court contained the precise claims that he had earlier raised in his petitions to the superior court and court of appeal. Thus, he employed California's system of original writs in an appellate fashion, seeking higher courts' review of claims that had been denied below. But that is not the case where, as in *Welch*, a prisoner effectively abandons his initial claims and subsequently files a petition raising entirely new claims.

interpreted to toll the statute during the entire period that a California prisoner is "appropriately pursuing and exhausting his state remedies," *Nino*, 183 F.3d 1004, which includes seeking review by the state court of appeal and supreme court "within a reasonable time."[25]

III. THE NINTH CIRCUIT PROPERLY CONCLUDED THAT MR. SAFFOLD HAD COMPLIED WITH CALIFORNIA'S COLLATERAL REVIEW PROCEDURES.

For the foregoing reasons, the issue in this case reduces to the fact-bound question whether Mr. Saffold's submission to the California Supreme Court was within the time permitted for such filings under state law. Mr. Saffold has suggested and continues to believe that this issue does not merit plenary consideration by this Court.[26] If the Court nonetheless wishes to resolve the issue, however, as discussed below, California law is inherently unclear, calling for an *ex post* determination of "reasonableness." The California Supreme Court persists in a practice of minute orders that frequently, and certainly in this case, do not clearly resolve the issue. In these circumstances, therefore, given that the California Supreme Court clearly reached the merits of at least some of Mr. Saffold's claims, the Ninth Circuit correctly proceeded on the basis that Mr. Saffold's state supreme court petition had not been filed after California's unspecified deadline. If this Court decides the issue at all—rather than dismissing the writ at this point—the Court should proceed on the same basis.

A. California's Law on Untimeliness Does Not Establish That Mr. Saffold's Petition to the California Supreme Court Was Untimely.

In most states, it is not difficult for habeas petitioners to ascertain the deadlines under state law for filing appeals. If they file out of time, they should know it, and further should understand that they must file a motion for leave to do so. A federal court subsequently reviewing whether a habeas appeal had been timely filed can make the determination by simple reference to the docket sheet and the calendar.

By contrast, California's vague and shifting timeliness rules give no clear answer as to how soon after a ruling in the court of appeal an original petition to the state supreme court must be filed. California law could, but does not, set forth a definite time period for such a filing. Instead, such a filing is subject to the indeterminate requirement that it be filed "within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis for the claim."

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[25] The Warden misses the mark by suggesting (Br. 18) that affirming the judgment below risks permitting ten-year delays in a prisoner's pursuit of state collateral relief. Under the reading of section 2244(d)(2) advocated here, the tolling period could last ten years only if the laws of the state in question provided prisoners with that amount of time within which to file their appeals. Any prejudice caused by such a delay would be suffered by the state, and only the state: the delay could frustrate the state's interest in finality, but no other entity has a cognizable interest in the finality of that state's judgments. Thus, the only entity conceivably prejudiced by these hypothetical delays—the state—is the precise entity with the power to stop them, by limiting the time prisoners have under state law to file their appeals. The state is perfectly able, therefore, to protect against any delay that it considers intolerable. Moreover, even if a state did allow ten years for filing an appeal from a denial of a state habeas petition, a prisoner serving a non-capital sentence would be unlikely to wait so long to appeal. As the Powell Committee observed, "prisoners serving an ordinary term of years have every incentive to bring their claims to resolution as soon as possible in order to gain relief." Powell Committee Report 5.

[26] *See* Respondent's Motion To Dismiss Writ of Certiorari As Improvidently Granted 8, 10 (citing *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (noting the importance of disposing of cases on the merits only in "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."), and *Powell v. Nevada*, 511 U.S. 79, 86-87 (1994) (Thomas, J., dissenting) (quoting *Layne & Bowler Corp.*)).

In re Harris, 855 P.2d at 398 n.7. State case law has not given meaningful content to this standard. *See Morales v. Calderon*, 85 F.3d 1387, 1390-92 (9th Cir.) (noting the lack of clarity in the case law on California's timeliness rules), *cert. denied*, 519 U.S. 1001 (1996). Accordingly, the Warden does not, and cannot, identify any rule clearly establishing that the four and one-half months from the decision by the state court of appeal to the filing of Mr. Saffold's petition in the California Supreme Court was an "unreasonable" delay—particularly in light of the unrebutted evidence that he submitted his petition on the very day he received a copy of the court of appeal's adverse order. In fact, as reflected in materials reproduced in the Appendix to this Brief, the four and one-half months in this case was within the time that has been allowed for such a submission by the Supreme Court.[27]

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[27] The California Supreme Court denied Mr. Saffold's petition on May 27, 1998. Pet. App. G-1. In 1998, the California Supreme Court adjudicated numerous petitions for habeas corpus filed many months after the court of appeal's decision on the merits, and did not deny the petitions as untimely. *See, e.g., In re Davis*, S067518, *infra* 1a-5a (eighteen months between court of appeal's denial on the merits and prisoner's filing in the supreme court; supreme court denied petition without any reference to delay); *In re Sampson*, S066428, *infra* pp. 7a-12a (nine months between court of appeal's denial on the merits and prisoner's filing in the supreme court; supreme court denied petition without any reference to delay); *In re Diaz*, S067327, *infra* pp. 13a-16a (over six months; denial without reference); *In re Weldon*, S066884, *infra* pp. 17a-20a (four months; denial without reference); *In re Saenz*, S067688, *infra* pp. 21a-24a (over four months; denial without reference). Copies of the California Supreme Court case files for each of these cases are being lodged with the Clerk. Although the California Supreme Court may in other cases refer to a "lack of diligence" when denying petitions filed after similar intervals, the court's failure to make any such reference in these cases renders the law in this area unclear at best. Moreover, under this Court's established approach for construing summary state court dispositions, the California Supreme Court's minute orders in *Davis* and *Sampson* are necessarily deemed to be based on the merits, and *not* on any finding of untimeliness. *See Ylst*, 501 U.S. at 803 ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. . . . [W]e will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place.").

Moreover, the Clerk of the California Supreme Court has advised prisoners seeking guidance regarding the filing requirements in that court that "there is *no deadline* within which to file a Petition for Writ of Habeas Corpus." Letter for Bobby R. Appleberry, from Robert F. Wandruff, Court Administrator and Clerk of the Supreme Court (June 26, 1997) (emphasis in original) (reproduced *infra* p. 25a); *see* letter for Bobby R. Appleberry, from Robert F. Wandruff (Jan. 21, 1998) ("Although Petitions for Review are jurisdictional and must be filed within specified time periods from decisions of the Court of Appeals, Petitions for Writ of Habeas Corpus can be filed at any time.") (reproduced *infra* p. 27a); letter for Jeffrey D. McClure, from Robert F. Wandruff (July 2, 1997) ("[Y]ou may file a Petition for Writ of Habeas Corpus with this Court at any time.") (reproduced *infra* p. 29a).

B. No Prior Decision in this Case Establishes That Mr. Saffold's Petition to the California Supreme Court Was Untimely.

Given the absence of a clear state rule, the federal courts are dependent on the California courts to declare, in a particular case, that a filing was out of time. In this case, the California Supreme Court's ruling is itself unclear. Because of this, and because the California Supreme Court clearly reached the merits, the Ninth Circuit proceeded on the basis that Mr. Saffold's submission to the California Supreme Court was timely. This Court should defer to that determination. *See UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 368 (1999) ("We do not normally disturb an appeals court's judgment on an issue so heavily dependent on an analysis of state law."); *Runyon v. McCrary*, 427 U.S. 160, 181-82 (1976) (same); *General Box Co. v. United States*, 351 U.S. 159, 165 (1956) ("We ordinarily accept the determinations of the Courts of Appeals on questions of local law, and we do so here."). At a minimum, this Court should not conclude that Mr. Saffold failed to satisfy the requirements of state law in submitting his petition to the state supreme court.

1. *The California Supreme Court did not clearly rule Mr. Saffold's petition to be out of time.*

The California Supreme Court's denial of Mr. Saffold's habeas petition was confined to a one-line order, unsupported by any citation, that stated simply: "Petition for writ of habeas corpus DENIED on the merits and for lack of diligence." Pet. App. G-1. It is clear from this order that the state supreme court reached the merits of at least some of Mr. Saffold's claims, and that with respect to at least some of his claims, the court determined that he had not, in some respect, met the "diligence" requirements of state law. Nothing more can be determined with certainty.

The critical question, of course, is what the court meant by "lack of diligence." As the Ninth Circuit observed, while on its face the reference could be to the four and one-half months between the California Court of Appeal's denial of Mr. Saffold's petition to that court and the filing of his petition in the California Supreme Court, it could also be to the five years that elapsed between the time Mr. Saffold's convictions became final and the filing of his first state habeas petition in the California Superior Court. Pet. App. A-11-12. If the latter was intended, the ruling might conceivably create certain procedural bars, but because more than four years of that time preceded the enactment of section 2244(d)(2), it would be of no relevance to the present inquiry. *See Duncan*, 121 S. Ct. at 2130 & n.1 (Stevens, J., concurring in part and concurring in the judgment) (collecting cases holding that, for prisoners whose convictions became final prior to AEDPA, the one-year limitations period began to run on AEDPA's date of enactment, April 24, 1996).

It is also possible that "lack of diligence" was not a reference to timeliness at all. As discussed more fully in Mr. Saffold's Motion To Dismiss Writ of Certiorari As Improvidently Granted (Mot. 5-6), the California courts use "lack of diligence" to describe not just untimeliness, but also the failure to raise certain claims on direct appeal before pressing

them on habeas. *See Ex parte Dixon*, 254 P.2d 513 (Cal. 1953) (establishing the general rule barring state habeas petitioners from raising claims that they should have raised on direct appeal); *In re Ronald E.*, 562 P.2d 684, 688 (Cal. 1977) (noting that petitioner had neither raised his claim on direct appeal nor justified his failure to do so, and holding that, "[i]n view of such *lack of diligence* on petitioner's part we concluded that he has waived the constitutional defects he now claims") (emphasis added).

Indeed, in *Thompson v. Procunier*, 539 F.2d 26 (9th Cir. 1976) (per curiam), the Director of the California Department of Corrections argued that the California Supreme Court's summary denial of a habeas petition alleging ineffective assistance of counsel was based on this precise kind of default. *Id.* at 27-28. The prisoner in that case failed to file a direct appeal of his conviction, and then raised ineffective assistance claims in three successive habeas petitions to the state superior court, court of appeal, and supreme court. *Id.* at 27. The California Supreme Court denied the petition without giving any indication whether it had reached the merits. When the prisoner then filed a federal habeas petition, the Director argued that the petition should be dismissed for failure to exhaust state remedies, on the theory that the prisoner failed to raise his ineffective assistance claims on direct appeal and that his failure to do so was the basis for the California Supreme Court's denial of his habeas petition. *Id.* at 27-28. Observing that, "[i]n California, issues relating to claimed ineffectiveness of counsel may be presented by appeal," *id.* (citing *In re Brown*, 511 P.2d 1153 (1973)), the Ninth Circuit stated that the Director might be correct in asserting that the California Supreme Court's denial was based upon "the broad rule . . . to the effect that habeas corpus normally will not lie where a remedy by appeal exists." *Id.* at 28. Ultimately, however, the court concluded that it was unable to determine from the face of the California Supreme Court's minute order whether the order was based on this default rule.

In light of the possibility—asserted by the state itself and recognized by the Ninth Circuit in *Thompson*—that a California habeas petitioner defaults on certain ineffective assistance claims not raised on direct appeal, the Warden is wrong to argue that "lack of diligence" could not have referred to such default in this case. *See* Opposition To Motion To Dismiss Writ As Improvidently Granted 5-7. It is true that in *In re Robbins*, 959 P.2d 311 (Cal. 1998), the California Supreme Court in a footnote ranging far afield from the issues before it in that case stated that the rule barring claims raised for the first time on habeas corpus does not apply "to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record." *Id.* at 340 n.34. But *Robbins* was decided *after* the California Supreme Court denied Mr. Saffold's petition, and it is unclear whether the *Robbins* court meant to clarify what its practice had always been, or to announce what its practice would be in the future. The Warden has cited no precedent prior to the California Supreme Court's decision in Mr. Saffold's case clearly holding that *all* ineffective assistance claims—including those that could have been raised on direct appeal—are exempt from the rule barring claims on habeas that could have been raised on direct appeal. Indeed, the case cited by *Robbins* itself on this point, *People v. Mendoza Tello*, 933 P.2d 1134 (Cal. 1997), recognized that where the trial record is adequate to resolve the claim, it is appropriate to raise ineffective assistance claims on direct appeal. *See id.* at 1136 (citing *People v. Camilleri*, 220 Cal. App. 3d 1199, 1202 (1990), as an example of such a case).[28] As discussed

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[28] To be sure, *Mendoza Tello* stated that claims of ineffective assistance that could *not* have been resolved on direct appeal because of the insufficiency of the trial record may be pressed for the first time on habeas, *see id.* at 1135 (where "the [trial] record sheds no light on why counsel acted or failed to act in the manner challenged, ... [a] claim of ineffective assistance *in such a case* is more appropriately decided in a habeas corpus proceeding") (emphasis added), but that is simply the obverse of the longstanding rule—cited by the state itself in the ineffective assistance context in *Thompson*, *supra*—that claims that *could* have been raised on direct appeal must be raised there, or risk being barred on habeas. *Mendoza Tello* did not hold anything clearly to the contrary of that general rule.

in Mr. Saffold's Motion To Dismiss (Mot. 5-6 & n.4), one of Mr. Saffold's claims of ineffective assistance of trial counsel is indeed arguably based entirely on the trial record.[29] Thus, the reference to "lack of diligence" might reflect a determination that Mr. Saffold should have raised that claim on direct appeal, not a finding of untimeliness at all.

The point here is not that the California Supreme Court's reference to a "lack of diligence" had a particular meaning; to the contrary, the point is that there is no way for this Court to determine what it meant, and particularly no way to conclude that the California Supreme Court was referring specifically to the four and one-half months between the decision of the court of appeal and Mr. Saffold's petition to the state supreme court. Indeed, of the three possibilities Mr. Saffold has been able to identify (pre-AEDPA delay; waiver for failure to raise one of his claims on direct review; and this four-and-one-half-month period), the latter period—during which, after all, the unrebutted evidence shows Mr. Saffold had no notice of the court of appeal's decision—appears to be the *least* likely. *See supra* n.27.

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[29] The fourth claim in Mr. Saffold's petition to the California Supreme Court asserted that his trial counsel failed to prepare for a hearing on a suppression motion, and that counsel subsequently "withdrew the motion because of his incompetence." J.A. 35. Mr. Saffold first made that claim in his petition to the California Superior Court. *Id.* at 11-12. That court rejected the claim with reference solely to the record, *id.* at 19, thus confirming the possibility that the California Supreme Court regarded the claim as one that could have been brought on direct appeal. Mr. Saffold does not concede any default in this regard, but for present purposes it suffices to observe that the California Supreme Court might have had such default in mind when it used the phrase "lack of diligence."

2. *The Ninth Circuit did not construe the California Supreme Court's order as a denial for untimeliness.*

Contrary to the implication of the question presented in this case, the Ninth Circuit did *not* conclude that Mr. Saffold's petition was untimely. In the absence of a clear ruling from the California Supreme Court on the issue, the Ninth Circuit instead proceeded on the basis that the state supreme court petition had been timely filed.

This is clear from the Ninth Circuit's observation that the case "does not" present "the question that [the Ninth Circuit] left open" in its prior decision in *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999). Pet. App. A-11. In *Nino*, the Ninth Circuit left open the question "whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." 183 F.3d at 1006 n.4. The Ninth Circuit in this case continued to reserve that question, because it concluded that here, as in *Nino*, the state high court had *not* dismissed the state habeas petition as untimely.

This point is reconfirmed by the Ninth Circuit's subsequent decision in *Welch v. Newland*, 267 F.3d 1013, *mandate stayed*, 268 F.3d 1124 (9th Cir.2001). In *Welch*, the Ninth Circuit explained that in *Saffold*, it had "viewed the California Supreme Court as having recognized the petitioner's use of post-conviction relief procedures to have been 'proper,' and thus within AEDPA's tolling provision." *Id.* at 1017; *see id.* at 1016 n.5 ("Notwithstanding the language concerning the petitioner's 'lack of diligence,' we construed the California Supreme Court's order as a dismissal on the merits."). Indeed, *Welch* again observed that *Nino* had left undecided the question whether tolling would be proper "if the California Supreme Court denied a petition on the ground of untimeliness," and *Welch* itself continued to leave that question unanswered. *Id.* at 1016 n.4. Clearly, the question could not

still be unanswered by the time of *Welch* if, as the Warden maintains, it had been answered four months earlier in this case.[30]

In short, although the Ninth Circuit below noted that the California Supreme Court's reference to "lack of diligence" could have two different timeliness-related meanings, it did not determine that Mr. Saffold's petition to the state supreme court was untimely under California law, or that the California Supreme Court had denied the petition because it was untimely. Thus, the Warden is simply wrong to characterize the Ninth Circuit's decision as holding that, "when a California Supreme Court ruling dismissing a habeas corpus petition for untimeliness alternatively addresses the merits, AEDPA's statute of limitations period is tolled from the filing of the state petition in the trial court until the California Supreme Court's denial of the habeas petition." Br. 9-10. To the contrary, as the Ninth Circuit made clear both in *Saffold* and *Welch*, the Ninth Circuit construed the state high court's order here as deeming Mr. Saffold's submission to be timely.[31]

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[30] *Welch* also stated that the Ninth Circuit's decision here "turned, not on the length of the time gap between [Mr. Saffold's] petitions [to the superior court, court of appeal, and state supreme court], but on the fact that the California Supreme Court had addressed Saffold's petition on the merits." 267 F.3d at 1016. Contrary to the Warden's assertions, however, this passage simply reflects the Ninth Circuit's determination—in light of the absence of any specific time limitations in California's collateral relief procedures, the ambiguity of the California Supreme Court's order, and the fact that the California Supreme Court reached the merits of at least some of Mr. Saffold's claims—to proceed on the basis that Mr. Saffold's petition had not been dismissed as untimely.

[31] As explained in Mr. Saffold's Motion To Dismiss Writ of Certiorari As Improvidently Granted, the Seventh Circuit's decision in *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000), also misunderstands the Ninth Circuit's decision in this case. *See* Mot. 7-8. Like the Warden, the *Fernandez* court understood the Ninth Circuit in this case to have answered the question left unanswered in *Nino*: whether an untimely state petition can toll AEDPA's one-year limitations period. But because the decision below is premised on the conclusion that Mr. Saffold's petition to the state

C. In the Circumstances of this Case, the Ninth Circuit Correctly Deemed Mr. Saffold's State Supreme Court Petition To Have Been Timely Filed.

The Ninth Circuit charted the appropriate course in this case. Given the absence of any specific time limitation in California's collateral relief procedures, the ambiguity of the California Supreme Court's order, and the indisputable fact that the California Supreme Court reached the merits of at least some of Saffold's claims, the court below was correct to proceed on the basis that Saffold's petition to the California Supreme Court was not untimely. This Court should not disturb the appeals court's judgment on this point. *See UNUM Life Ins. Co.*, 526 U.S. at 368; *Runyon*, 427 U.S. at 181-82; *General Box Co.*, 351 U.S. at 165. Rather, it should affirm the Ninth Circuit's case-specific decision to "construe[] the California Supreme Court's order as a dismissal on the merits." *Welch*, 267 F.3d at 1016 n.5.

Moreover, to permit an ambiguous "lack of diligence" ruling to bar such a claim would attribute to Congress an unlikely intent to impose unique burdens on California state prisoners. In virtually every other state in the Union, prisoners can readily understand when they need to file their state habeas appeals in order to be timely and thus (under the circuit courts' unanimous interpretation of section 2244(d)(2)) to continue the pendency of their state habeas application. In California, however, as discussed above, there are no clearly stated time limits. To permit non-specific references to "lack of diligence" to bar prisoners' claims on timeliness grounds in cases like this one would deprive prisoners of any effective notice about how to exhaust their state remedies while receiving the benefit of section 2244(d)(2)'s tolling. Such a ruling would do nothing to encourage California—through legislative or judicial action—to resolve this confusion by enacting or judicially announcing clear deadlines. At a minimum, it does not impose an unreasonable burden before barring a claim on timeliness grounds to require that the state supreme court's order make clear that its "lack-of-diligence" ruling in fact supports such a result.

supreme court was timely filed, and actually adheres to the unanimous rule among the circuit courts (including the Seventh Circuit) that the pursuit of state collateral review tolls section 2244(d)(1)'s limitations period from the initial filing until the final resolution of any timely appeal, there is no reason to believe that, if presented with facts like those of *Fernandez*, the Ninth Circuit would rule any differently than the Seventh.

At most, this Court should remand the case for further factual development on whether Mr. Saffold's petition to the California Supreme Court was in fact timely. The Fourth Circuit recently adopted this approach under similar circumstances in *Allen v. Mitchell*, No. 00-7439, 2001 WL 1658838 (4th Cir. Dec. 27, 2001). In that case, the court observed "the absence of a fixed appellate deadline under North Carolina law" for filing petitions for certiorari in the North Carolina Supreme Court. *Id.* at *3. Rather, much like California, North Carolina provides only that such petitions must be filed "without unreasonable delay." *Id.* (quoting N.C. R. App. P. 21(c)). Noting that the North Carolina Supreme Court had not clearly dismissed Allen's petition to that court as untimely, the Fourth Circuit stated that it was unable to "say that Allen's petition was necessarily untimely solely because it was filed *more than four years* after" the decision of the state superior court. *Id.* (emphasis added). Similarly, this case presents at most the *possibility* that Mr. Saffold's pursuit of state collateral remedies was untimely, and the Court could remand for further factual development on this issue. For the reasons given above, however, Mr. Saffold submits that judicial economy, fairness, and the statutory scheme are better served by the Ninth Circuit's approach, which places the responsibility for establishing clear rules on the state, the only party that can do so.

CONCLUSION

The Ninth Circuit's decision in this case "merely follow[ed] the tolling rule set out [by that court] in *Nino*," *Welch*, 267 F.3d at 1016, and is consistent with the courts of appeals' unanimous construction of section 2244(d)(2) in this context. This Court should affirm that unanimous construction and the Ninth Circuit's application of it here. Alternatively, the Court should dismiss the writ as improvidently granted or remand the case for further proceedings to determine whether Mr. Saffold's petition to the California Supreme Court was timely under state law.

Respectfully submitted,

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January 2002

APPENDIX A

S067518

IN THE SUPREME COURT OF CALIFORNIA

[FILED May 27, 1998]

IN RE JOHN G. DAVIS
ON
HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

/s/
Chief Justice

Name JOHN G. DAVIS
Address P.O. Box 3461
Corcoran, California 93212
CDC or ID Number H-23360

IN THE SUPREME COURT FOR THE
STATE OF CALIFORNIA

[FILED Jan. 26, 1998]

JOHN G. DAVIS Petitioner	PETITION FOR WRIT OF HABEAS CORPUS
vs.	No. S067518
G. GALAZA, WARDEN Respondent	

INSTRUCTIONS - READ CAREFULLY

Read the entire form *before* answering any questions.

This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.

Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."

If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.

If you are filing this petition in the Court of Appeal, file the original and four copies.

If you are filing this petition in the California Supreme Court, file the original and thirteen copies.

Notify the Clerk of the Court in writing if you change your address after filing your petition.

In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) at the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44-(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Form Approved by the Judicial Council of CaliforniaMC-275 (Rev. January 1, 1992)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

[FILED July 11, 1996]

In re	B 102280
JOHN G. DAVIS	(Super.Ct.No.YA021301)
On Habeas Corpus	(William R. Hollingsworth, Jr., Judge)

ORDER

THE COURT:*

The petition for writ of habeas corpus filed May 21, 1996, has been read and considered together with Los Angeles Superior Court case file YA 021301, People vs. John G. Davis.

The petition is denied.

The superior court file contains defendant's April 18, 1995 application for a certificate of probable cause. The application was denied for absence of facts warranting issuance of a certificate of probable cause. This was a correct ruling. The application contains only checked-off pre-printed conclusions of ineffective trial counsel without specification of facts satisfying Penal Code section 1237.5, subdivision (a).

The superior court file does not contain anything supporting the claim that defendant's trial counsel was ineffective. The "Guilty Plea in Superior Court" form initialed by defendant in connection with his nolo contendre plea shows that the maximum sentence defendant faced upon a conviction was 30 years.

The superior court file contains defendant's July 13, 1995, motion for a complete record. That application was correctly denied by the superior court on the ground no

appeal was pending and the certificate of probable cause had been denied. Convicted felons who fail to perfect a timely appeal are not entitled to a complete record of their case, at state expense, just to record for possible issues to be raised in a habeas corpus petition. Such an application for record must state specific facts showing particular claims of error with possible merit.

The petition does not include an corroboration that defendant mailed letters to his trial counsel within the 60-day appeal period requesting aid in perfecting an appeal.

/s/	/s/	/s/

* VOGEL (C.S.) P.J., HASTINGS, J., BARON, J.

APPENDIX B

S066428

IN THE SUPREME COURT OF CALIFORNIA

[FILED May 27, 1998]

IN RE EDDIE L. SAMPSON

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

/s/
Chief Justice

Name Eddie L. Sampson

Address Salinas Valley State Prison

Facility B-5, 223L, P.O. Box 1040

Soledad, Ca. 93960-1040

CDC or ID Number K01633

CALIFORNIA SUPREME COURT

[FILED Dec. 1, 1997]

Eddie L. Sampson
Petitioner

vs.

James Gomez, et. al.
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. _____

INSTRUCTIONS — READ CAREFULLY

Read the entire form *before* answering any questions.

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Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies be furnished the Supreme Court and Court of Appeal.

Form Approved by the Judicial Council of California MC-275 (Rev. January 1, 1992)

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

[FILED Feb. 10, 1997]

In re EDDIE LEE SAMPSON,	D027688
On	(San Diego County
Habeas Corpus.	Super. Ct. No. SCD106152)

THE COURT:

The petition for writ of habeas corpus has been read and considered by Justices Huffman, Haller and McIntyre. Petitioner currently has an appeal pending before this court (*People v. Sampson*, D025541) which arises out of a 1995 conviction in Superior Court case number SCD114458. In the pending case petitioner has been convicted of residential burglary (Pen. code, §§ 459, 460) with a finding that he had a prior serious felony conviction (a strike) within the meaning of Penal Code section 667, subdivisions (b) - (i). The strike conviction resulted from petitioner's 1994 no contest plea to residential burglary (Pen. Code §§ 459, 460) in Superior Court case number SCD106152.

In this petition, petitioner contends appellate counsel in D025541/SCD114458 is providing ineffective assistance of counsel because he has refused to raise the claim that the trial court erred when it denied an in limine motion to invalidate the strike conviction. Petitioner contends his strike conviction is invalid because:

1) Trial counsel who represented him in that case did not properly investigate a defense.

2) When the trial court took his no contest plea pursuant to *People v. West*: (1970) 3 Cal.3d 595, it erred in finding a factual basis for the plea.

As to trial counsel's alleged failure to investigate, petitioner fails to support his claims by declarations of his

purported witnesses or otherwise. Moreover, he fails to demonstrate that investigation and presentation of the purported defense would have resulted in a different outcome.

As to the alleged court error in taking his plea, Penal Code section 1192.5 requires a court to satisfy itself that a plea is "freely and voluntarily made and, that there is a factual basis for the plea." The trial judge should develop the factual basis on the record but a defendant may enter a guilty plea even while maintaining his innocence. (*People v. Watts* (1977) 67 Cal.App.3d 173, 178-180.) Moreover, a trial court's finding will be upheld where defense counsel stipulates to the factual basis and the record demonstrates that the basis exists. (*People v. Mickens* (1995) 38 Cal.App.4th 1557, 1564-1565.)

Here, petitioner contends there was no factual basis presented in the record. He further contends the trial court made a conclusory finding based solely on defense counsel's stipulation that there was a factual basis for the plea in the preliminary hearing transcript. Petitioner is mistaken. While defense counsel did stipulate that the preliminary hearing transcript provided a factual basis for the plea, it was not the sole basis for the court's decision. Rather, the transcript from the change of plea hearing demonstrates there was adequate information presented, independent of the stipulation, from which the court could conclude there was a factual basis for the plea.

The court at least three times during the change of plea hearing stated it would not take the plea without there being a factual basis to demonstrate petitioner was guilty of the charge. The court examined the petitioner extensively. Petitioner had been arrested at approximately midnight outside a residence. His codefendant was found inside the residence having entered through a second story window. Petitioner's clothes were dirty in a manner consistent with his having assisted the codefendant to enter the building. Petitioner at the change of plea hearing claimed he had not assisted the codefendant and that his clothes were dirty because he had earlier helped

his aunt to move. However, he admitted that he and the codefendant had been having a conversation before the codefendant entered the residence. He further admitted he knew what was going on and that he knew his codefendant's purpose was to steal something. It is evident from the transcript that the court reviewed photographs taken at the time of petitioner's arrest. The photographs showed both the petitioner in his dirty clothes and the residence including the window through which the codefendant entered. Shortly after having reviewed the photographs, the court accepted the plea. Despite the petitioner's claim of innocence, there was sufficient evidence to establish a factual basis for the plea.

Petitioner also claims that he did not know the consequences of his plea until after he was charged in the current case. The transcript of the change of plea hearing shows petitioner was fully advised of the consequences of his plea including the fact it was a serious felony which would be a strike under the three strikes law. The court explained in detail that upon the conviction of any new felony, even petty theft or possession of a rock of cocaine, petitioner would have to serve at least double the base term of the new felony. The record is clear that petitioner knew the consequences of his plea and that it was freely and voluntarily given.

The record does not demonstrate any error by the court in accepting petitioner's plea in Superior Court case number SCD106152. Nor does it demonstrate ineffective assistance of trial counsel in that case. The trial judge in the current case (D025541/SCD114458) did not abuse his discretion when he denied petitioner's motion in limine to invalidate petitioner's strike conviction. Appellate counsel was not ineffective for refusing to raise a meritless issue.

The petition is denied.

HALLER, Acting P.J.

Copies to: All parties

APPENDIX C

S067327

IN THE SUPREME COURT OF CALIFORNIA

[FILED May 27, 1998]

IN RE OSCAR DIAZ
ON
HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

/s/
Chief Justice

Name OSCAR, DIAZ

Address S.V.S.P.

P.O. BOX 1020

SOLEDAD, CALIFORNIA 93960

CDC or ID Number J77827

SUPREME COURT OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

[FILED Jan. 20, 1998]

In re OSCAR, DIAZ Petitioner	PETITION FOR WRIT OF HABEAS CORPUS
vs.	
WARDEN: GARY, LINDSEY Respondent	No.S067327

INSTRUCTIONS - READ CAREFULLY

Read the entire form *before* answering any questions.

This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.

Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is, "continued on additional page."

If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.

If you are filing this petition in the Court of Appeal, file the original and four copies.

If you are filing this petition in the California Supreme Court, file the original and thirteen copies.

Notify the Clerk of the Court in writing if you change your address after filing your petition.

In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Form Approved by the Judicial Council of California MC-275 (Rev. January 1, 1992)

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 06/27/97

S.v.s.p. Cdc
Oscar Diaz
J-77827
P.O. Box 1050
Soledad, CA. 93960

RE: Diaz, Oscar
VS.
In Re Oscar Diaz On H.c.
2 Criminal B112647
Los Angeles No. BA114239

THE COURT:

The petition for writ of Habeas Corpus is denied.

APPENDIX D

S066884

IN THE SUPREME COURT OF CALIFORNIA

[FILED June 24, 1998]

IN RE MARK WELDON

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

/s/ _____
Chief Justice

Name MARK WELDON
Address 3B04-118-L
Post Office Box 3466
Corcoran, CA 93212
CDC or ID Number J-57944

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

[FILED Dec. 30, 1997]

MARK WELDON
Petitioner

vs.

GEORGE M. GALAZA, Warden
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. S066884

INSTRUCTIONS - READ CAREFULLY

Read the entire form *before* answering any questions.

This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.

Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."

If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.

If you are filing this petition in the Court of Appeal, file the original and four copies.

If you are filing this petition in the California Supreme Court, file the original and thirteen copies.

Notify the Clerk of the Court in writing if you change your address after filing your petition.

In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Form Approved by the Judicial Council of California MC-275 (Rev. January 1, 1992)

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

[FILED Aug.21, 1997]

In re MARK WELDON, On Habeas Corpus.

B 114636
(L.A.S.C. No. LA018025)
ORDER

THE COURT*:

The petition for writ of habeas corpus, filed August 13, 1997, has been read and considered.

The petition is denied.

---

*SPENCER, P.J. VOGEL (Miriam A.), J. MASTERSON, J.

APPENDIX E

S067688

IN THE SUPREME COURT OF CALIFORNIA

[FILED June 24, 1998]

IN RE GERRY SAENZ
ON
HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

/s/
Chief Justice

Name Gerry Saenz K-18680

Address Dorm 314, Bed 21

California Rehabilitation Center

Norco Ca 91760

CDC or ID Number

California Supreme Court

[FILED Feb. 2, 1998]

Gerry Saenz Petitioner	PETITION FOR WRIT OF HABEAS CORPUS
vs.	
Jo Ann Gordon, Warden Respondent	No. S067688

INSTRUCTIONS — READ CAREFULLY

Read the entire form *before* answering any questions.

This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.

Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on a additional page."

If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.

If you are filing this petition in the Court of Appeal, file the original and four copies.

If you are filing this petition in the California Supreme court, file the original and thirteen copies.

Notify the Clerk of the Court in writing if you change your address after filing your petition.

In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies be furnished the Supreme Court and Court of Appeal.

Form Approved by the Judicial Council of California MC-275 (Rev. January 1, 1992)

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

[FILED Sept. 10, 1998]

In re GERRY SAENZ, E021087
COUNTY NO. CR70044

on Habeas Corpus

THE COURT:

The petition for writ of habeas corpus is DENIED.

McKINSTER [stamp]
Acting P.J.

cc: Superior Court Clerk, Riverside County, P.O. Box 431, Riverside, CA 92502

District Attorney Riverside County, 4075 Main St., Riverside, CA 92501

Attorney General, 110 West "A" St., Ste. 1100, San Diego, CA. 92101

Gerry Saenz
K-18680
P.O. Box 8503 C-2-206 Low
Pleasant Valley State Prison
Coalinga, CA 93210

APPENDIX F

Supreme Court of California

[Letterhead]

ROBERT F. WANDRUFF
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

June 26, 1997

Mr. Bobby R. Appleberry
#C-67823
P. O. Box 7300
Crescent City, CA 95531-7500

Re: B111487: In Re Bobby R. Appleberry on Habeas Corpus

Dear Mr. Appleberry:

The Supreme Court lost jurisdiction to act on a Petition for Review from the denial of your Writ of Habeas Corpus on June 16, 1997.

However, there is *no deadline* within which to file a Petition for Writ of Habeas Corpus. Therefore, you will not require an extension of time. Please send in your Petition for Writ of Habeas Corpus when you are able.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

/s/

By: Patricia A. Quinn, Deputy Clerk

la/sf

APPENDIX G

Supreme Court of California

[Letterhead]

ROBERT F. WANDRUFF
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

January 21, 1997

Mr. Bobby R. Appleberry
#C-67823
P. O. Box 7300
Crescent City, CA 95531-7500

Re: B111487: In Re Bobby R. Appleberry on
Habeas Corpus denied May 15, 1997

Dear Mr. Appleberry:

Please be advised that our records do not indicate any filings by you in our Court whether by Petition for Review or by Petition for Writ of Habeas Corpus. Although Petitions for Review are jurisdictional and must be filed within specified time periods from decisions of the Court of Appeals, Petitions for Writ of Habeas Corpus can be filed at any time. Therefore, I am enclosing the form, Petition for Writ of Habeas Corpus, for your convenience.

Very truly yours,
ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

/s/

By: Patricia A. Quinn, Deputy Clerk

paq/Enclosure
la/sf

APPENDIX H

Supreme Court of California

[Letterhead]

ROBERT F. WANDRUFF
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

July 2, 1997

Mr. JefferyD. McClure
#D-75472
44750 60th Street West
Lancaster. CA 93536-7620

Re: B111905: In Re Jeffery D. McClure on Habeas Corpus

Dear Mr. McClure:

The Supreme Court lost jurisdiction on June 23, 1997, to act on a Petition for Review from the Second Appellate District's denial of May 22, 1997 of your Writ of Habeas Corpus.

However, you may file a Petition for Writ of Habeas Corpus with this Court at any time. Enclosed is a copy or the form Writ of Habeas Corpus (Judicial Council Form 56.5) for your convenience. Please fill out and *sign the form* on Page 6 and return it at your convenience.

As to your request for provision of copies of the Petition for Writ of Habeas Corpus filed in the Court of Appeals, we are unable to do so. If you are unable to make sufficient copies of this Writ and exhibits, please send one of each document.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

/s/

By: Patricia A. Quinn, Deputy Clerk

Enclosure/la/sf

COPY

No. 01-301

Supreme Court, U.S.
FILED
FEB 8 2002
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

TOM L. CAREY, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
JO GRAVES
Senior Assistant Attorney General
ARNOLD O. OVEROYE
Senior Assistant Attorney General
STAN CROSS
Supervising Deputy Attorney General
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Fax: (916) 324-2960
Counsel for Petitioner

30 PP

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-301

TOM L. CAREY, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

ARGUMENT

I. *SAFFOLD* SHOULD BE REVERSED BECAUSE IT IS CONTRARY TO CONGRESSIONAL INTENT AND WOULD "SAP THE FEDERAL STATUTE OF MUCH OF ITS EFFECT"

In *Rose v. Lundy*, 455 U.S. 509, 517-518 (1982), this Court recognized that "the policies underlying the statutory provision" must be analyzed to determine the statute's proper scope when "'there are ambiguities in the legislative language that must be resolved'" and that "'courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation . . . when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed.'" *Id.* at 517-518, citations omitted. Petitioner submits that this Court should follow *Rose v. Lundy* and interpret the meaning of "pending" in AEDPA's tolling provision "on the basis of" the statute's "language and legislative history, and consistent with its underlying policies" with the goal of providing "a simple and clear instruction to

potential litigants . . . ." *Id.* at 520.

Although Respondent has provided this Court with an alternative interpretation of the relevant statutory language, Petitioner submits that the gap theory relied upon by the district court and recently discussed in *Robinson v. Ricks*, 163 F.Supp.2d 155 (E.D.N.Y. 2001) most accurately reflects congressional intent and the policy judgments underlying AEDPA's one-year statute of limitations. The gap theory should be adopted by this Court because it promotes federalism, comity and finality while at the same time providing a simple, clear and uniform method to toll the statute of limitations in both appellate review states and original jurisdiction states without the need to stretch statutory language. In contrast, the Ninth Circuit's indefinite tolling rule "would sap the federal statute of limitations of much of its effect" by allowing tolling for delays of months or years beyond the one-year limitations period. Furthermore, *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001) requires stretching of the statutory language to cover original jurisdiction states like California, disregards the policy considerations underlying the statute of limitations, and would continue the present state of confusion created by the conflict in the circuits and the diversity of state procedural law.

Before addressing the deficiencies in Respondent's interpretation of 28 U.S.C. § 2244(d)(2), Petitioner will first discuss three false premises in Respondent's brief, namely that the Ninth Circuit did not construe the California Supreme Court's order as a denial for untimeliness; that there is no circuit conflict because of his allegedly "timely" state petition; and that California's system of successive original writs is the functional equivalent of an appellate system.

A. California Law and *Saffold* Leave No Doubt that Respondent's State Petition was Denied on the Alternative Ground of Untimeliness

Respondent's attempt to resurrect his motion to dismiss in

Argument III of his Brief on the Merits should be rejected for the reasons stated in Petitioner's December 4, 2001, opposition to that motion. Once again, Respondent provides this Court with a faulty discussion of California law and an erroneous reading of *Saffold* in an effort to convince this Court that he filed a timely petition in the California Supreme Court and that the majority opinion in *Saffold* is therefore not in conflict with the other circuits that toll the statute of limitations until the final disposition of any timely appeal relating to an application for collateral review.

In his discussion of California law, Respondent correctly points out that original petitions are subject to the general requirement that they "be filed 'within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis for the claim.'" Resp. Br. 39-40, quoting *In re Harris*, 5 Cal.4th 813, 828, n.7 (1993). However, Respondent neglects to add that *Harris* also stated that claims of ineffective assistance of counsel (the underlying claim in the instant case) "should be filed in conjunction with the direct appeal" as a verified petition for habeas corpus. *Id.*, citing *People v. Pope*, 23 Cal.3d 412, 426-427, n.17 (1979). Consequently, there can be no doubt that Judge O'Scannlain correctly observed in his *Saffold* dissent that "[i]n a case involving such dilatory behavior as this, . . . the clock must continue to run in the periods of excessive delay between the three separate habeas petitions." Pet. App. A 15.

Respondent attempts to confuse the issue by speculating that the California Supreme Court's "lack of diligence" finding might not have referred to untimeliness but rather to a conclusion that he had failed "to raise certain claims on direct appeal before pressing them on habeas." Resp. Br. 42-43, citing *In re Ronald E.*, 19 Cal.3d 315, 322, 562 P.2d 684, 688 (1977), and *In re Dixon*, 41 Cal.2d 756, 759, 264 P.2d 513 (1953). However, *In re Ronald E.* is inapposite because it did not involve an ineffective assistance of counsel claim, and *In re Dixon*, which set forth the general rule barring state habeas

petitioners from raising claims that they should have raised on direct appeal, is not applicable to Respondent's case because of the California Supreme Court's explicit exception to the *Dixon* rule set forth in *People v. Mendoza Tello*, 15 Cal.4th 264, 933 P.2d 1134 (1997) **prior** to the California Supreme Court's decision in Respondent's case.

Respondent attempts to skirt the *Tello* exception by providing this Court with a truncated quotation from *Tello* followed by the assertion that *Tello* "did not hold anything clearly to the contrary of" the general rule. Resp. Br. 44-45, n.28. However, immediately following the passage quoted by Respondent, the *Tello* court explicitly sets forth the exception to the *Dixon* rule for ineffective assistance claims, thereby refuting Respondent's speculative argument that the reference to "lack of diligence" might have reflected a determination that he should have raised his ineffective assistance claim on direct appeal rather than a finding of untimeliness. Resp. Brf. 44-45. The *Tello* court explained the exception as follows:

> **Because claims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding, the rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal** (*see . . . In re Dixon* (1953) 41 Cal.2d 756, 759 [264 P.2d 513]) **would not bar an ineffective assistance claim on habeas corpus.**

People v. Mendoza Tello, 15 Cal.4th at 267, citations omitted, emphasis added; *In re Robbins*, 18 Cal.4th 770, 814, n.34 (1998) [providing a detailed explanation of the court's order practice including the practice of not applying *Dixon* bars "to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record."]. Consequently, in cases such as Respondent's where the only claims raised on collateral review concern ineffective assistance of counsel, California law is clear that a "lack of diligence" finding necessarily refers to undue delay rather than to a failure

to preserve a claim on direct appeal.[1/]

Furthermore, Respondent is manifestly incorrect in his assertion that the Ninth Circuit "did not construe the California Supreme Court's order as a denial for untimeliness" and that it "instead proceeded on the basis that the state supreme court petition had been timely filed." Resp. Br. 46. To the contrary, the majority opinion in *Saffold* repeatedly stated that the California Supreme Court's dismissal of Respondent's ineffective assistance of counsel claim was "for untimeliness." Pet. App. A 11-12. However, despite its recognition that "the California Supreme Court applied its untimeliness bar" (Pet. App. A 12), the *Saffold* court concluded that the time should remain tolled "because the dismissal for untimeliness at least partially addressed the merits" and "[a]ccordingly, such an untimeliness ruling did not constitute an independent state ground of decision." *Id.* at 11-12; *see* Judge Stewart's concurring and dissenting opinion in *Melancon v. Kaylo*, 259 F.3d 401 (5th Cir. 2001) stating that the *Saffold* "court tolled the intervening time even though the California Supreme Court had applied the untimeliness bar as an alternative ground for denying relief. *Saffold*, 250 F.3d at 1266-67." 259 F.3d at 409, J. Stewart concurring in part, dissenting in part.

In short, *Saffold* was not "premised on the conclusion that Mr. Saffold's petition to the state supreme court was timely filed" (Resp. Br. 47-48, n.31), but rather on the premise that his untimeliness under state law was in effect excused or purged for purposes of the federal statute of limitations because the state supreme court alternatively addressed the merits, thereby qualifying his late filing as "proper pursuit" in the eyes of the

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1. It should be noted that the Ninth Circuit recently reaffirmed the conclusion of *La Crosse v. Kernan*, 244 F.3d 702, 705 (9th Cir. 2001) that a California Supreme Court denial of a habeas petition citing "lack of diligence" is an application of the state's untimeliness bar. *Bennett v. Mueller*, 273 F.3d 895, 898, 902 (9th Cir. 2001).

Saffold majority.[2/]

B. Respondent's Suggested "Uniformity" Among the Circuits Does Not Exist

Respondent is simply wrong when he claims that *Saffold's* indefinite tolling rule falls within the majority approach of "providing for a **prompt**, orderly, and proper use of the state courts prior to the filing of a federal habeas petition." Resp. Br. 9, emphasis added. Delays of four and a half months, fifteen months, or more than four years sanctioned by

2. It should be noted that Respondent's attempt to bolster his argument with letters from the Clerk of the California Supreme Court advising prisoners that "there is *no deadline* within which to file a Petition for Writ of Habeas Corpus" (Resp. Br. 41, n.27) confuses "proper pursuit" with "properly filed." The letters from the Clerk merely demonstrate that state petitions will be "properly filed" whenever they are filed because there is no deadline for filing original petitions in California. Petitioner does not disagree that such a "properly filed application" in California would be entitled to tolling under § 2244(d)(2) for the period of time following the proper filing until decision by the state court. However, that is not to say that if the properly filed petition has been found to be untimely filed under state law, as in Respondent's case, that tolling should be granted for the gap between the prior denial of the intermediate appellate court and the untimely but proper filing in the state supreme court.

It should be further noted that Respondent's attempt to bolster his argument with the materials reproduced in the Appendix to his brief and the case files lodged with this Court (Resp. Br. 40-41, n.27) merely demonstrate that the California Supreme Court arguably did not regularly apply its untimeliness bar in 1998. However significant such a conclusion might be in the area of procedural bar case law, it is of no moment for the present case which concerns a statute of limitations defense rather than a procedural bar defense. In short, Respondent makes the same mistake as the Ninth Circuit by failing to recognize that resolution of the meaning of "pending" under AEDPA's statute of limitations involves determining the intent of Congress rather than applying procedural bar case law to determine whether a state supreme court ruling is based upon independent and adequate grounds which are regularly applied.

Saffold's indefinite tolling rule can hardly be considered to be "prompt" use of the state courts. *Welch v. Newland*, 267 F.3d 1013, 1016-1017 (9th Cir. 2001) [four-and-a-half-year delay permitted on authority of *Saffold*]; *Romero v. Roe*, 130 F.Supp.2d 1148, 1149-1151 (C.D. Cal. 2001) [15-month delay permitted on authority of *Saffold*]. There can be no doubt that the Seventh Circuit correctly identified the circuit conflict and recognized that *Saffold* opened up the possibility that delays of 10 years or more "would sap the federal statute of limitations of much of its effect" and "would give § 2244(d)(2) a Cheshire-cat like quality, both there and not there at the same time."[3/] *Fernandez v. Sternes*, 227 F.3d 977, 980-981 (7th Cir. 2000);

3. The Seventh Circuit's concern that "*Saffold* implements a make-believe approach, under which petitions are *continuously* pending whenever a state court allows an untimely filing" (227 F.3d at 981) has recently materialized in a California case where the prisoner's first federal petition had been dismissed as barred under the statute of limitations because 9 months had passed before his first state petition and another 25 months had passed since his state petition had been denied by the California Court of Appeal with no petition having been filed with the state supreme court. However, approximately three months after the dismissal of the federal petition, the prisoner finally filed a state petition in the California Supreme Court, and the federal court was bound by *Saffold's* indefinite tolling rule to find that although the first federal petition filed 21 months earlier was barred by the statute of limitations, the second federal petition was not barred. *Cate v. Ayers*, 2001 WL 1729214 at *2-3 (E.D.Cal. Dec. 28, 2001) (unreported). The court further noted that it was bound to follow *Saffold* "until such precedent is overruled by an intervening U.S. Supreme Court opinion." *Id.* at *3, n.6.

In contrast to the gap theory which provides a simple method to determine tolling, *Saffold* as well as the other circuits rejecting the gap theory subject prisoners and the federal courts to uncertainties posed by the diversity and complexity of state laws and rules pertaining to post-conviction relief or other collateral review. *See* Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief*, App. A (1996 ed.); *Allen v. Mitchell*, 276 F.3d 183, 187, n.3 (4th Cir. 2001) [suggesting the necessity of an evidentiary hearing to determine whether a delay of over four years was "without reasonable delay" might be more burdensome to the state than abandoning its statute of limitations defense].

accord, *Melancon v. Kaylo*, 259 F.3d at 407 [rejecting *Saffold* and agreeing with the concern expressed by *Fernandez* and *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000) "over the potential for indefinite tolling"]; *Allen v. Mitchell*, 276 F.3d at 185-186 [agreeing with the majority position of the Fifth, Seventh and Tenth Circuits and rejecting *Saffold's* rule that tolls "an untimely appellate petition . . . unless the state court expressly dismissed the petition as untimely without any examination of the merits"].

In short, Respondent's suggested "uniformity" among the circuits does not exist. As a consequence, the questions presented by Respondent in his brief on the merits are improperly framed and should be answered negatively by this Court. Respondent's first question presented should be rejected because the Ninth Circuit did not "adopt" the majority view of the courts of appeals "that a state habeas petition is pending from the initial filing of the petition until the final resolution of any *timely* requests for review." Resp. Br. i, italics added. This is apparent because, as discussed *supra* in section A, the Ninth Circuit itself concluded that the state supreme court had found Respondent's petition to be untimely. Consequently, Respondent's second question presented also should be rejected because the Ninth Circuit did not construe his "petition to the state supreme court as timely filed . . ." *Id.*

C. Given the Prohibition of Appeal and Rehearing in California's System of Successive Original Petitions, Nothing is Pending Following Denial of a Petition by the Trial Court or the Intermediate Appellate Court Until Another Petition is Properly Filed

Respondent argues that California's "system of successive original writs is the functional equivalent of an appellate system" and that the time "a California prisoner spends seeking timely appellate review of his petition for post-conviction relief

is time that his post-conviction proceedings are 'pending' within the meaning of section 2244(d)(2) . . . ." Resp. Br. 29. Respondent is incorrect.

The California Supreme Court has consistently rejected the notion that appeal or rehearing is available following the denial of an original petition for habeas corpus unless such an appeal is explicitly provided for by statute. *France v. Superior Court*, 201 Cal. 122, 127 (1927) [the decision of any court in a *habeas corpus* proceeding cannot be reviewed by any other court in any way]; *In re Zany*, 164 Cal. 724, 726-727, 729-730 (1913) [habeas corpus proceedings cannot be reviewed by any other court; California Supreme Court has no power of transfer in habeas corpus proceedings]; *In re Washer*, 200 Cal. 598, 609 (1927) ["There is no practice here allowing petitions for rehearing in case of *habeas corpus*."]; *In re Hughes*, 159 Cal. 360, 363, 366 (1911) ["No appeal lies from a judgment given in a proceeding in *habeas corpus*."]; *Ex parte Robinson*, 71 Cal. 608, 611 (1887) ["There is no practice here allowing petitions for rehearing in cases of *habeas corpus*."]; *In re Perkins*, 2 Cal. 424, 430 (1852) [determination of a judge concerning writs of habeas corpus "is not appealable from or subject to review"].[4] The California Supreme Court's explanation of habeas corpus proceedings set forth in *Zany* is particularly instructive:

> It has always been the law in this state that the decision of any court in a *habeas corpus* proceeding, provided the court has jurisdiction, cannot be reviewed by any other court in any way. The right of appeal has never been given, and no other method for such review has ever been provided. . . . The result

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4. It should be noted that *Bunney v. Mitchell*, 262 F.3d 973, 974 (9th Cir. 2001) improperly stretched AEDPA's statute of limitations by creating the fiction that rehearing might be available under California law and by ignoring the fact that exhaustion had been completed and that nothing was pending before the state supreme court. *See Nara v. Frank*, 264 F.3d 310, 319 (3d Cir. 2001). Adoption of the gap theory by this Court would rectify *Bunney's* error.

has been that, with reference to such proceedings, the supreme and superior courts, to each of which was given the power to issue writs of *habeas corpus*, stood upon the same plane, neither being inferior to the other in any other sense than that a superior court in determining any such matter would naturally follow a precedent established by the highest court in the state, if any such precedent had been established. It however, had the *power* to disregard it, and **its determination**, whether in accord with the law as laid down by the supreme court or not, **was an end of the particular proceeding**, and in case of a discharge of the petitioner from custody was final and conclusive. . . . **Where a petitioner was remanded to custody by a superior court, and the proceeding instituted in that court was thus terminated and was no longer a matter *pending therein*, he could inaugurate a *new proceeding* for relief in another court** and can still do so, but is now limited in the **making** of **a new application** by statutory provision **to a higher court**, either the district court of appeal having jurisdiction, or the supreme court.

In re Zany, 164 Cal. at 726-727, italics in original, emphasis added; *see Jones v. State*, 471 S.W.2d 166, 168-169 (Mo 1971) ["appeal does not lie in habeas corpus" but prisoner may "file a **new application** for habeas corpus in an appellate court"]. With regard to the district courts of appeal, the *Zany* court further explained that "[a] *habeas corpus* proceeding **cannot fairly be said to be so "pending" at any time after judgment by such court**. **Such a proceeding is finally and definitely ended by the judgment** . . . ." *Id.* at 729, italics in original, emphasis added. Although the California Legislature has provided that the People may appeal from the granting of habeas corpus relief (Cal. Pen. Code § 1506), the California Supreme Court had repeatedly stated that a defendant may not appeal denial of a petition for writ of habeas corpus. *In re*

Clark, 5 Cal.4th 750, 767, n.7 (1993); *In re Hochberg*, 2 Cal.3d 870, 876 (1970), disapproved on other grounds in *In re Fields*, 51 Cal.3d 1063 (1990); *Loustalot v. Superior Court*, 30 Cal.2d 905, 913 (1947).

In short, affirmance of *Saffold's* indefinite tolling rule requires stretching AEDPA's statutory language to create a legal fiction (a non-existent appeal from a final decision) to allow tolling for the gaps between original petitions in states such as California.[5/] In contrast, no such stretching of AEDPA's language is needed to employ the gap theory across all jurisdictions.

D. The Indefinite Tolling Rule Should be Reversed Because it Would be Inappropriate to Conclude that Congress Would Choose to Adopt State Law Rules that Are at Odds with the Language and Purpose of AEDPA's Statute of Limitations

Respondent argues that the language of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), should be interpreted to refer to a single period because the statute uses "time" and "application" in the singular and that Petitioner's interpretation

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5. Although the traditional rule in American courts was that an order denying habeas relief was not appealable absent a statute authorizing such an appeal, "statutes allowing appeals were the clear trend" by the late nineteenth century. CJLF Br. 11; Resp. Br. 30. Nevertheless, as pointed out by the Nevada Supreme Court in *Ex parte Sullivan*, 189 P.2d 338, 342 (1948), "California is one of the fifteen or more states which, in the absence of statute providing for appeal or writ or error in habeas corpus cases, follow the common-law rule to the effect that a judgment or order in a habeas corpus proceeding is not appealable." Although the Nevada Supreme Court retains its original jurisdiction in habeas corpus, *Blair v. Crawford*, 275 F.3d 1156 (9th Cir. 2002), the Nevada Legislature joined the majority of states in 1991 by enacting Nevada Revised Statute § 34.575 providing for appeal to the supreme court from the order of a district court denying a petition for writ of habeas corpus.

of "pending" makes no sense because it allegedly would create a more harsh tolling provision for noncapital petitioners than for capital petitioners under 28 U.S.C. § 2263(b)(2). Resp. Br. 16-20. Respondent is incorrect.

First, Respondent's interpretation of § 2244(d)(2) is contrary to that of *Duncan v. Walker*, 121 S.Ct. 2120 (2001), where this Court stated that "the provision limits the harm to the interest in finality by according tolling effect only to 'properly filed application*[s]* for State post conviction or other collateral review.'" *Id.*, at 2128, brackets in original, italics added. Second, Petitioner's view that Congress contemplated tolling for the pendency of multiple applications is more consistent with the purpose and policy considerations underlying the statute. Congress sought to encourage diligence on the part of prisoners seeking collateral review and knew that although *pro se* prisoners would be able to "properly file" state petitions, they very well might not "get it right" the first time. In other words, they might fail to properly present their claims thereby resulting in dismissal without prejudice to file a new application more fully setting forth a prima facie case for their claims. *See Artuz v. Bennett*, 531 U.S. 4, 9 (2000) [recognizing that "the question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar"]. It is reasonable to conclude that Congress intended to provide tolling under § 2244(d)(2) for new properly filed applications seeking to correct deficiencies in a *pro se* prisoner's first application.

Furthermore, contrary to Respondent's view (Resp. Br. 19-20), there is more than a mere semantic difference in the wording of §§ 2244(d) and 2263(b). Section 2263(b) provides for a 180-day limitations period, tolls only for the first petition for post-conviction review, and tolls from the filing of that petition until the final State court disposition of that petition. Section 2244(d), by contrast, provides for a one-year limitations period, tolls for multiple post-conviction applications, but offsets the large added delay that tolling for multiple

applications might cause by tolling only during the pendency of those applications. These are concrete differences in operation, with specific language designed to effectuate those differences, and a sensible policy reason underlying the different rules regarding when tolling occurs.

Although most noncapital prisoners have an incentive to file meritorious applications for collateral relief prior to their sentences running, Congress certainly was aware that many noncapital prisoners are serving life terms or very long sentences and might be inclined to procrastinate or "sleep on their rights" and that many might be tempted to file meritless claims as a form of recreation or as an attack on the establishment. Congress also was aware that capital prisoners in non opt-in states have no incentive to diligently exhaust their state remedies. To take care of these problems, Congress doubled the statute of limitations in § 2244(d) over that in § 2263(b) and tolled the time during which any given properly filed application for collateral review was pending. By this, Congress intended to encourage *pro se* prisoners to diligently file their claims with state courts to receive tolling and further intended to encourage them to diligently file corrected applications, successive original applications and applications for appeal of denials. By allowing the statute of limitations to run in the gaps between properly filed applications, Congress also intended to reduce delay on the part of capital prisoners in the non opt-in states who otherwise had no incentive to exhaust their state remedies.

Contrary to Respondent's assertions, Petitioner has not abandoned the position that prisoners should not be punished under AEDPA's statute of limitations for delays beyond their control, and Petitioner's construction of § 2244(d)(2) would not generate "anomalous consequences" when a prisoner requires a trial transcript or "*wins* his state habeas case in a lower state court." Resp. Br. 23-25. In most situations the delay caused by transcript preparation or an appeal by the state will not be prolonged and will be covered by the extra six months Congress

included in the statute of limitations to deal with anticipated delays in the course of litigation by prisoners under Chapter 153. In short, minimal delays are not outside the control of the prisoner. He simply should not wait until the last minute to file his first petition, thereby causing potential difficulties by his own actions. However, in the event that long delays outside the prisoner's control actually impede filing an application, for example due to the state's failure to timely provide a necessary transcript or due to the state intentionally delaying an appeal in order to run the statute of limitations, such a delay would constitute a due process violation that would result in an additional year of tolling following the removal of the state created impediment pursuant to § 2244(d)(1)(B). *See Gardner v. California*, 393 U.S. 367, 368-370 (1969) [finding the "same invidious discrimination" caused by denial of a transcript that had been held impermissible in *Griffin v. Illinois*, 351 U.S. 12 (1956) as a due process violation and in *Long v. District Court*, 385 U.S. 192 (1966) as denial of equal protection]. Furthermore, in the event that delay caused by extraordinary circumstances outside the control of the prisoner did not qualify as a state created impediment pursuant to § 2244(d)(1)(B), such delay would merit equitable tolling given Congress's intent not to punish the prisoner for delay outside his control.

In short, the "anomalous consequences" predicted by Respondent will not come to pass because Congress drafted § 2244(d) to protect the diligent *pro se* prisoner's ability to file his state and federal applications within the one-year period. Petitioner's interpretation of § 2244(d)(2) promotes AEDPA's purpose to encourage diligent exhaustion of state court remedies. Diligent behavior in filing at each level of review is rewarded because tolling is only granted after a properly filed application is placed before a court for decision and no tolling is granted for the gaps following a court's decision at one level and prior to the next properly filed application. Thus the gap theory furnishes a strong incentive to seek relief at each successive stage of review. In contrast, *Saffold* minimizes the

incentive for a prisoner to seek relief at each successive level because he will be granted tolling as long as the state court decides (for whatever reason) to address the merits of his claims. *Saffold* saps § 2244(d) of much of its effect by ignoring congressional intent and the policy judgments underlying the statute (Pet. Br. 29-36) and at the same time creates a trap for the prisoner and "a perverse incentive for states to adopt severe default rules with narrow or no exceptions." CJLF Br. 17-18. In so doing, *Saffold* relies upon the concept of "proper pursuit" which is nowhere mentioned in § 2244(d)(2) but is instead a creation of *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999) and *Nino v. Galaza*, 183 F.3d 1003, 1006-1007 (9th Cir. 1999).

Petitioner submits that it would be inappropriate to conclude that Congress would choose to adopt state law rules that are at odds with the language and purpose of AEDPA's statute of limitations. *Cf. DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 161 (1983) [recognizing that "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law" and that "it may be inappropriate" in such circumstances "to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law"]; *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 367 (1977) [recognizing that "State legislatures do not devise their limitations periods with national interests in mind"]. By affirming *Saffold* and adopting Respondent's view that the states should be encouraged to change their laws and rules to promote finality (Resp. Br. 48-49), this Court would permit *Saffold* to sap § 2244(d) of much of its effect and would also undermine federalism by promoting federal interference with the sovereign states' rights to determine their own laws, procedures and rules and by encouraging states to draft state statutes that would alter the meaning of the federal statute of limitations. Petitioner respectfully submits that such an approach would be a disservice to both the federal and state

courts as well as to the interests of society.

II. THERE IS NO INEQUITY IN ENFORCING THE STATUTE OF LIMITATIONS AGAINST RESPONDENT

Amici National Association of Criminal Defense Lawyers and National Association of Federal Defenders contend that a ruling by this Court enforcing the statute of limitations should be applied prospectively only. NACDL Br. 10. The argument rests on the premise that court decisions shortening well-established statutes of limitations should not be applied retroactively. Petitioner respectfully submits that the authority cited by *amici* in support of their argument does not support prospective application here. Saffold is neither constitutionally nor equitably entitled to prospective application of the statute.

"A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express*, 511 U.S. 298, 313, n.12 (1994). Due process is violated only if the judicial construction was unforeseeable. *Bouie v. Columbia*, 378 U.S. 347, 353-54 (1964) [addressing the interpretation of a state criminal statute]. While reasonable jurists may differ as to the interpretation of the phrase in question, the very fact that courts have come to these different conclusions indicates that either result was "foreseeable." *Cf. Spencer v. Sutton*, 239 F.3d 626, 629 (4th Cir. 2001) [rejecting the district court's endorsement of the gap theory but recognizing that "it was entirely reasonable for the district court to have so held" given that the gap theory was not rejected by the Fourth Circuit until after the district court decision]; *Deerwester v. Carter*, 26 F.Supp.2d 1080, 1082 (C.D. Ill. 1998) [on rehearing noting that its prior support of gap theory was an appropriate interpretation but that it would "not stray from the flock" "[w]ithout a clear indication from the Seventh Circuit or the United States Supreme Court"].

Bouie itself described the requisite level of unforeseeability as one in which the new construction is "[without] the slightest support in prior . . . decisions." *McDonald v. Champion*, 962 F.2d 1455, 1460 n.5 (6th Cir. 1992), quoting *Bouie*, 378 U.S. at 356. In *Marks v. United States*, 430 U.S. 188, 194 (1977), this Court found due process violated by judicial expansion that "marked a significant departure" from prior precedent. In the absence of a judicial interpretation which amounts to an unpredictable shift in the law, due process is not violated. See *United States v. Balint*, 201 F.3d 928, 935-936 (7th Cir. 2000) ["Due process does not require insulating defendants when our decision merely clarifies the meaning of a statute."]; *United States v. Killion*, 30 F.3d 844, 846 (7th Cir. 1994) ["'*Bouie* applies only to unpredictable shifts in the law, not to the resolution of uncertainty that marks any evolving legal system.'"]; *United States v. Burnom*, 27 F.3d 283, 284 (7th Cir. 1994) ["That courts have rendered decisions later deemed erroneous by higher authority does not entitle criminal defendants to the benefits of those mistakes."].

Since the language of the statute at issue informed Saffold that it could be construed in the manner employed by the district court when it applied the gap theory, there is no retroactive application problem. Indeed, a contrary rule would mean that no statutes could ever have any effect until the precise meaning of each term and phrase was fully litigated.

The cases cited by *amici* in support of their argument are inapposite. They all involve situations in which the litigants filed their complaints under the belief that a longer statute of limitations period applied. After the filing of their complaints, courts overruled long lines of well established authority and ruled that a shorter period applied. In such cases, courts have held that it would be unfair to litigants to apply the new, shorter statute of limitations. For example, in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 98-100 (1971) there was a line of federal decisions holding that the equitable doctrine of laches governed such actions rather than the state's one-year statute of

limitations. Similarly, in *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987), it had been clearly established that a six-year statute of limitations period applied at the time the plaintiff therein filed suit, but subsequent decisions reduced the period to two years.

In the instant case, there was no extant authority causing Saffold to believe that indefinite gaps between state collateral filings would toll the statute of limitations. Saffold first filed in federal court on June 4, 1998, and the district court dismissed his petition for failing to meet AEDPA's statute of limitations on January 6, 1999. (J.A. 3, 65; Pet. App. E.) *Barnett v. Lemaster*, 167 F.3d 1321, *Nino v. Galaza*, 183 F.3d 1003, *Taylor v. Lee*, 186 F.3d 557 (4th Cir. 1999) and the other circuit court cases rejecting the gap theory were all filed after the district court had dismissed Saffold's federal petition. Furthermore, published cases recognizing the applicability of the one-year statute of limitations period generally began appearing as early as July 1, 1996. *United States* v. *Bazemore*, 929 F.Supp 1567, 1569 (SD Ga. 1996). *See also Curtiss* v. *Class*, 939 F.Supp. 703, 705 (W.D. S.Dak. 1996). As noted in *Taylor*, among these published cases was a published district court opinion (since abrogated by *Taylor*) espousing the gap theory. *Taylor v. Lee*, 186 F.3d at 561["*See Moseley v. French*, 961 F.Supp. 889, 892 (M.D.N.C.1997) ('The one-year period is given for the very purpose of preparing petitions, motions, etc. and, therefore, cannot be considered a tolling event.')."] Given that there were published AEDPA statute of limitations cases prior to the filing of Saffold's federal petition and given that the Circuit Court opinions rejecting the gap theory were not filed until after his federal petition was filed and dismissed, Saffold cannot credibly argue that he relied on an interpretation of AEDPA's one-year statute of limitations that rejected the gap theory. Accordingly, he has no basis upon which to request equitable relief.

With regard to the *Chevron* factors, Petitioner submits that they militate against *amici's* argument. Although many circuits

have ruled that there is statutory tolling during the various "gaps," all of those rulings came down after the date Saffold's petition was filed, and thus he cannot claim that he relied on those decisions. The second factor, regarding the intent of the statute, also cuts against *amici's* argument. The intent of Congress in enacting the statute of limitations was to "considerably speed up the habeas process." *Miller v. New Jersey*, 145 F.3d 616, 618 (3rd Cir. 1998). "The statute of limitation in Section 2244(d) was Congress' primary vehicle for streamlining the habeas review process and lending finality to state convictions." *Acosta v. Artuz*, 221 F.3d 117, 122 (2d Cir. 2000) (internal quotations omitted.) In contrast, the Ninth Circuit's indefinite tolling rule "would sap the federal statute of limitations of much of its effect" (*Fernandez v. Sternes*, 227 F.3d at 980), and substantially reduces any possibility that the habeas review process will be expedited.

Finally, the last *Chevron* factor also weighs against nonretroactive application. In weighing the equities, it is important to note that federal habeas petitioners will not be deprived of any rights whatsoever. They can still obtain both state and federal collateral review, but simply must do so within specified time limits. Moreover, to the extent individual habeas petitioners are deprived of federal habeas review under the statute of limitations, that is a procedural hurdle that Congress has already deemed to be consistent and acceptable in the context of federal habeas. Also, it cannot be overlooked that of those habeas petitioners who would be deprived of federal habeas review, the vast majority of them have already received the opportunity for complete review on direct appeal, review in this Court by way of certiorari review, and collateral review in state court, so there is no likelihood that they are being deprived of their post-conviction remedies.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petitioner's Brief on the Merits, Petitioner respectfully requests that this court reverse the judgment of the Ninth Circuit and reinstate the district court's dismissal of Respondent's application for writ of habeas corpus.

Dated: February 7, 2002

Respectfully submitted,

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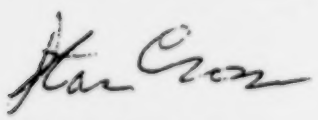

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In the

Supreme Court of the United States

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ANTHONY NEWLAND,

Petitioner,

v.

TONY EUGENE SAFFOLD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF NORTH CAROLINA, ALABAMA, ARIZONA, COLORADO, DELAWARE, HAWAII, ILLINOIS, KANSAS, MARYLAND, MASSACHUSETTS, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, VIRGINIA, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the one-year limitations period for filing federal habeas corpus petitions set forth in 28 U.S.C. § 2244(d)(1) is tolled pursuant to 28 U.S.C. § 2244(d)(2) during the interval between a state court's denial of post-conviction relief and the filing of a "properly filed application" seeking appellate review of that denial.

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INTEREST OF THE AMICI CURIAE

Federal habeas corpus review necessarily involves re-examining state court proceedings and delaying the date on which the States and their citizens can feel confident that a criminal case has truly reached its conclusion. Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") in response to States' concerns that the federal habeas process was not sufficiently deferential to state court judgments and was overly protracted. To address the latter concern, Congress enacted 28 U.S.C. § 2244(d)(1), which sets a one-year limitations period for filing federal habeas petitions. The limitations period is, however, subject to tolling under 28 U.S.C. § 2244(d)(2), which is the statutory provision at issue in this case. The Amici States have a strong interest in the timely and orderly resolution of state cases and in the finality of criminal convictions. It is therefore important to the Amici States that the tolling provision not be interpreted in a manner that will undermine the one-year limitations period.

INTRODUCTION AND SUMMARY OF ARGUMENT

AEDPA's tolling provision provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). The crucial question of statutory interpretation in this case is when a "properly filed application" for State post-conviction or other collateral review is considered to be "pending."

Several years ago, the Ninth Circuit interpreted § 2244(d)(2) as providing that the one-year limitations period set forth in § 2244(d)(1) is tolled from the time a prisoner's first state habeas petition is filed until the state supreme court rejects the prisoner's final collateral challenge. *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). In this case, the Ninth Circuit embellished that construction of § 2244(d)(2) by holding the same result obtains even where a prisoner unreasonably delays filing a habeas petition in the California Supreme Court, as long as that court rejects the petition on the merits in addition to "for lack of diligence." Pet. App. A 10-13. Following that decision, a panel of the Ninth Circuit held that the limitations period was tolled during another prisoner's delay of over four years between the trial court's denial of post-conviction relief and his filing an original petition for habeas relief with the California Supreme Court. *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001), *mandate stayed*, 2001 WL 1309002 (9th Cir. Oct. 29, 2001).

The Ninth Circuit's interpretation of the tolling provision is contrary to § 2244(d)(2)'s language and thwarts the limitations and tolling provisions' purpose by allowing potentially indefinite tolling. The best reading of § 2244(d)(2)'s language—and the reading most consistent with the purpose of § 2244(d)—is that the one-year limitations period is not tolled during the interval between a state court's denial of post-conviction relief and the filing of a "properly filed application" seeking appellate review of that denial. *See generally Robinson v. Ricks*, 163 F. Supp. 2d 155 (E.D.N.Y. 2001) (adopting and thoroughly discussing this interpretation). In this case, that means that

neither the time period after the trial court's denial of respondent's habeas petition and before respondent's filing an original habeas petition in the California Court of Appeal, nor the time period after the court of appeal's denial and before respondent's filing an original habeas petition in the California Supreme Court, should toll the limitations period.[1]

A. Interpreting the tolling provision not to toll the interval between a state court's denial of post-conviction relief and the filing of a "properly filed application" seeking appellate review of that denial is consistent with § 2244(d)(2)'s language. This Court has defined the term "properly filed application" as an application that is filed and accepted in accordance with the applicable state rules governing filings. *See Artuz v. Bennett*, 531 U.S. 4, 8-9 (2000). This Court thus has made clear that the term "properly filed application" refers to the actual document a prisoner files in state court seeking post-conviction review. The term "pending" is commonly defined as something that

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[1] The Ninth Circuit held that respondent's petition in the California Supreme Court was "properly filed." Pet. App. A 12-13 n.8. Amici disagree. An application for relief is not "properly filed" when it is filed outside the time allotted under state rules and is denied "for lack of diligence," whether or not the state court also reaches the merits of the application. (Amici recognize this Court left that question open in *Artuz v. Bennett*, 531 U.S. 4, 8 n.2 (2000).) Because, however, the issue before this Court is the meaning of the term "pending," this brief assumes *arguendo* that respondent's petition was "properly filed." In light of that, this brief refers to two types of "properly filed applications"— *timely* ones, which are filed within the period allotted by state law for seeking review; and *untimely* ones, which are filed outside the time limit but are nonetheless addressed on the merits by the state court.

is incomplete, unsettled, or undetermined. Applying these two definitions, a "properly filed application" is no longer "pending" once the court in which the application was filed has ruled on it because there is nothing left incomplete, unsettled, or undetermined with respect to the application. There is thereafter no "properly filed application" that is pending in any state court unless and until the prisoner properly files another application in a higher state court.

A comparison of § 2244(d)(2)'s language to other provisions of AEDPA supports this reading. Section 2263(b)(2), for example, explicitly provides that the 180-day limitations period applicable to special habeas procedures in capital cases is tolled "from the date on which the first petition for postconviction review or other collateral relief is filed *until the final State court disposition of such petition.*" 28 U.S.C. § 2263(b)(2) (emphasis added). Similarly, § 2244(d)(1)(A) states that the one-year limitations period begins running from "the date on which the judgment became final *by the conclusion of direct review or the expiration of the time for seeking such review.*" 28 U.S.C. 2244(d)(1)(A) (emphasis added). The fact that these other provisions of AEDPA expressly include the entire review process, while § 2244(d)(2) does not, is strong evidence that § 2244(d)(2) does not include for tolling purposes the time period after a state court denies post-conviction relief and prior to the filing of a "properly filed application" seeking appellate review of that denial.

B. One of the main concerns that led to AEDPA's enactment was the lengthy delay that often occurred in the habeas process. AEDPA's limitations and tolling provisions were intended to address this problem,

thereby respecting principles of finality, while at the same time balancing concerns of comity and federalism by allowing prisoners to pursue their state remedies. Interpreting the tolling provision not to toll the "gaps" between stages of state court post-conviction review is consistent with AEDPA's purpose because such an interpretation speeds up the federal habeas process, but still allows prisoners who are reasonably diligent to exhaust their state remedies. Furthermore, such an interpretation can be expected to result in fewer protective federal filings because it is clear and simple, thereby removing the uncertainty that motivates protective filings.

C. The Ninth Circuit's conclusion that § 2244(d)(2) tolls the entire interval between a state court's denial of post-conviction relief and the *untimely* filing of an application seeking appellate review of that denial allows tolling for many months and years when no court is actually reviewing an application. This approach upsets the careful balance Congress struck among finality, comity, and federalism by placing little weight on Congress' goal of speeding up the federal habeas process. The court's conclusion that § 2244(d)(2) tolls the interval between a state court's denial of post-conviction relief and the *timely* filing of an application seeking appellate review of that denial also defeats Congress' intent. Although this approach results in perhaps less extreme problems than tolling prior to untimely filings, it still fails to give full effect to the federal one-year limitations period and is unsupported by § 2244(d)(2)'s language. The delays created by these interpretations of § 2244(d)(2) harm the States because the longer the delay is before federal habeas review begins, the greater the danger is

that evidence will become stale, citizens' confidence in the States' judicial systems will decrease, and the States and victims of crime will be left with little assurance that a criminal case has really ended.

ARGUMENT

NO "PROPERLY FILED APPLICATION" IS "PENDING" DURING THE INTERVAL BETWEEN A STATE COURT'S DENIAL OF POST-CONVICTION RELIEF AND THE FILING OF A "PROPERLY FILED APPLICATION" SEEKING APPELLATE REVIEW OF THAT DENIAL

A. Section 2244(d)(2)'s Language, Especially When Compared To Other Provisions Of AEDPA, Supports Amici's Construction Of The Term "Pending"

1. The starting point of statutory interpretation is the language of the statute itself. *Williams v. Taylor*, 529 U.S. 420, 431 (2000). The tolling provision contained in 28 U.S.C. § 2244(d)(2) provides that the one-year limitations period is tolled during the time in which a "properly filed application" for State post-conviction or other collateral review is "pending." This Court has already instructed that an "application" is "properly filed" for purposes of § 2244(d)(2) "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Bennett*, 531 U.S. at 8 (footnote omitted). This Court has further explained that an "application" and a "claim" are not synonymous; instead, an

application contains claims. *Id.* at 9. In sum, this Court's decision in *Bennett* makes clear that the term "properly filed application" in § 2244(d)(2) refers to the actual document which a prisoner files in a state court seeking state post-conviction relief.[2]

At issue here is when such an application is "pending." *Black's Law Dictionary* defines "pending" as "[r]emaining undecided; awaiting decision." *Black's Law Dictionary* 1154 (7th ed. 1999). The prior edition of *Black's Law Dictionary* defined the term "pending" more extensively and supplied the following four definitions:

> [1] Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in the process of settlement or adjustment. [2] Awaiting an occurrence or conclusion of action, period of continuance or indeterminacy. [3] Thus, an action or suit is "pending" from its inception until the rendition of final judgment. [4] An action is "pending" after it is commenced by either filing a complaint with the court or by the service of a summons.

Black's Law Dictionary 1134 (6th ed. 1990). The Ninth Circuit has in effect adopted the third definition, which appears to deem an "action" or "suit" to be "pending"

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[2] As this Court has recognized, the States use "diverse terminology" when referring to their various forms of state collateral review. *Duncan v. Walker*, 121 S. Ct. 2120, 2127 (2001). This brief uses the term "post-conviction" generically to encompass all forms of state collateral review that are available after a conviction.

during all the time periods between levels of review. *See also Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (referring to cases "pending on direct review" when determining the retroactive application of new rules of criminal procedure). The basic flaw with that reading is that this case does not address the question of when an "action," "suit," or "case" is "pending." At issue is when a "properly-filed application" is "pending." Only the first of the *Black's Law Dictionary* definitions (now reflected more concisely in the seventh edition) is relevant to that inquiry.

A "properly filed application" is "pending" when the court in which the application was "properly filed" has "not yet completed" action on it. As a matter of common sense and plain English, once that court has denied the application, the application is no longer pending because there is nothing left incomplete, unsettled, or undetermined with respect to the application. To be sure, a prisoner may appeal (or petition for appellate review of) that denial, and state law often provides a specified time period in which to file such an appeal or petition. But no "application" is pending between the date the application is denied and the date appellate review is sought. Not until the prisoner actually files a document seeking appellate review is an application (*i.e.*, a document requesting relief) pending again.[3] This understanding of "pending"

[3] In *Tinker v. Hanks*, 255 F.3d 444, 445-46 (7th Cir. 2001), the court held that an application for permission to file a second or successive state post-conviction proceeding is not a "properly filed application" within the meaning of § 2244(d)(2). Whether that decision was correct is not before this Court. Nor is the related question whether an application seeking permission to file an appeal from the denial of an application for post-conviction relief is a "properly filed application." Accordingly, this brief assumes *arguendo* that such an application is a "properly filed application" within the meaning of § 2244(d)(2).

"applications" dovetails with this Court's recognition in *Slack v. McDaniel*, 529 U.S. 473, 481 (2000), that "[w]hile an appeal is a continuation of the litigation started in the trial court, it is a distinct step" that can be described as "an appellate case."

2. The construction of § 2244(d)(2) adopted by the Ninth Circuit and advocated by respondent confuses the term "pending" with the concept of finality. Under their approach, any post-conviction proceeding that is not yet final remains "pending." As pointed out in *Robinson v. Ricks*, however, had Congress intended to equate the two concepts "it could readily have provided for tolling until state collateral review becomes 'final' by the conclusion of such review or the expiration of the time for seeking such review." 163 F. Supp. 2d at 168. Other provisions of AEDPA do just that, confirming that when Congress wanted a statutory provision to encompass the time from the first filing in state court until the end of the state appellate court review process, Congress knew how to state that concept explicitly.

Section 2263, for example, provides that the 180-day limitations period applicable to special habeas procedures in capital cases is tolled "from the date on which the first petition for postconviction review or other collateral relief is filed *until the final State court disposition of such petition.*" 28 U.S.C. § 2263(b)(2) (emphasis added). This language embodies the finality approach adopted by the Ninth Circuit and stands in

stark contrast to § 2244(d)(2), which includes no reference to the "final State court disposition." Congress had good reason to provide that tolling under § 2263(b)(2) encompasses the gaps between stages of state court post-conviction review, while tolling under § 2244(d)(2) does not, because the limitations period tolled by § 2263(b)(2) is considerably shorter than the limitations period tolled by § 2244(d)(2).

Similarly, 28 U.S.C. § 2244(d)(1)(A) states that the one-year limitations period begins running from "the date on which the judgment became final *by the conclusion of direct review or the expiration of the time for seeking such review*" (emphasis added). This language, too, is consistent with the Ninth Circuit's finality approach; however, § 2244(d)(2)'s language contains no mention of the review process, the time for seeking review, or the concept of finality.

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan v. Walker*, 121 S. Ct. 2120, 2125 (2001) (quotations omitted). Congress' inclusion in § 2263(b)(2) and § 2244(d)(1)(A) of language which explicitly captures the time from the first filing in state court until the final state court disposition and the end of the state court review process, juxtaposed with Congress' exclusion of such language in § 2244(d)(2), shows that Congress did not intend § 2244(d)(2) to include for tolling purposes the interval between a state court's denial of post-conviction relief and the filing of a "properly filed application" in a higher state court. The Ninth

Circuit's reading of the tolling provision ignores these other provisions of AEDPA, and imports language into § 2244(d)(2) that simply is not there.[4]

B. Amici's Interpretation of § 2244(d)(2) Furthers The Limitations And Tolling Provisions' Objectives

1. Concerns about lengthy delays in the federal habeas process were one of the motivating forces that led to the enactment of AEDPA. As the influential Powell Report noted, the system in place prior to AEDPA "led to piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law. The resulting lack of finality undermine[d] public confidence in our criminal justice system." U.S. Judicial Conference, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report, 1 (1989).[5] Frustration with these

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[4] If this Court were nonetheless to conclude that the time period between the denial of a motion for state post-conviction relief and the filing of a *timely* "properly filed application" seeking appellate review of that denial does toll the one-year limitations period, it would not follow that the same rule holds when the prisoner files an *untimely* "properly filed application." Although amici believe the term "pending" does not cover either time period, many courts of appeal have stretched the term to cover the time period before the filing of a timely application. But the term is stretched beyond the breaking point when it is extended to encompass times when no petition for review has yet been filed and the time for filing such a petition has expired.

[5] This report is commonly referred to as the "Powell Report" because the committee's chairman was Justice Powell.

delays in the federal habeas process prompted the introduction in Congress of more than 80 bills proposing a statute of limitations in the 10 years prior to AEDPA's enactment. *See Lonchar v. Thomas*, 517 U.S. 314, 333-34 (1996) (listing bills in the Appendix).

AEDPA's legislative history reveals that Congress enacted the limitations and tolling provisions in order to alleviate these delays in the federal habeas process while still respecting principles of comity and federalism. The Judiciary Committee Report accompanying H.R. 729, an immediate precursor of AEDPA in the same Congress as AEDPA and which contained limitations and tolling provisions that are identical in all material respects to those in AEDPA, expresses this legislative purpose as follows:

> Title I of the bill contains provisions designed to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases. This proposal is the culmination of almost 15 years of work in Congress to achieve meaningful habeas corpus reforms.
>
> . . . .
>
> First, the bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings . . . . To help accomplish the first purpose, the bill imposes periods of limitation on federal habeas petitions filed under 28 U.S.C. section 2254 or motions filed under 28 U.S.C. section 2255 . . . . This reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review

> when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner.

H.R. Rep. No. 104-23, at 8-9 (1995). Similarly, the House Conference Report on AEDPA states that AEDPA

> incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases. It sets a one year limitation on an application for a habeas writ and revises the procedures for consideration of a writ in federal court. It provides for the exhaustion of state remedies and requires deference to the determinations of state courts
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> . . . .

H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944.

Consistent with this legislative history, this Court has explained that Congress enacted AEDPA in order "to further the principles of comity, finality, and federalism." *Williams*, 529 U.S. at 436. The one-year limitations period "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review," while the tolling provision "balances the interests served by the exhaustion requirement and the limitation period . . . . At the same time, the provision limits the harm to the interest in finality by according tolling effect only to 'properly filed application[s] for State post-conviction or other collateral review.'" *Walker*, 121 S. Ct. at 2128.

2. The construction of § 2244(d)(2) advocated herein maintains the balance of interests sought by Congress. Running the limitations period during the interval between a state court's denial of post-conviction relief and the filing of a "properly filed application" seeking appellate review of that denial speeds up the federal habeas process while still providing prisoners with ample opportunity to exhaust state remedies first. The 365 days granted by Congress to prisoners is perfectly sufficient to permit prisoners to prepare an initial post-conviction application and to prepare one, and sometimes two, petitions seeking review of denials of that application. As noted in *Robinson v. Ricks*, those many prisoners who do not file petitions for writs of certiorari with this Court gain an additional 90 days to exhaust their state-court remedies; and "appeals (or applications for leave to appeal) frequently take the form of a document seeking review based on the record below." 163 F. Supp. 2d at 169. In sum, a reasonably diligent prisoner should have little difficulty exhausting his state remedies and meeting the federal one-year limitations period, even when that period is not tolled during the "gaps."

Many courts of appeal have nevertheless construed § 2244(d)(2) to toll the limitations period between stages of the state post-conviction process, at least when the prisoners sought appellate review in a timely fashion.[6] Those decisions expressed two policy

[6] *See, e.g., Melancon v. Kaylo*, 259 F.3d 401, 406 (5th Cir. 2001); *Gibson v. Klinger*, 232 F.3d 799, 803-04 (10th Cir. 2000); *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000); *Swartz v. Meyers*, 204 F.3d 417, 420-22 (3d Cir. 2000); *Peterson v. Gammon*, 200 F.3d 1202, 1204-05 (8th Cir. 2000); *Bennett v. Artuz*, 199 F.3d 116, 119-20 (2d Cir. 1999), *aff'd on other grounds*, 531 U.S. 4 (2000); *Taylor v. Lee*, 186 F.3d 557, 561 (4th Cir. 1999), *cert. denied*, 528 U.S. 1197 (2000).

concerns with adopting a rule that does not toll the "gaps" after a state court's denial of post-conviction relief and before the filing of a "properly filed application" in a higher state court. Such a rule, they stated, would (1) undermine comity by preventing prisoners from exhausting their state remedies before proceeding to federal court, and/or (2) unleash a flood of protective federal filings. Both concerns are misplaced.

The previous discussion rebuts the first concern. Only prisoners who wait to begin the state post-conviction review process until almost a year has passed will have any difficulty exhausting their state remedies before filing timely federal habeas petitions. This situation, however, is one of the prisoners' own making, and does not justify reading language into the tolling provision that is not there. Take, for example, a prisoner who waits 120 days after the end of direct review before filing his state post-conviction relief application, waits 60 days after that application is denied before appealing to the intermediate appellate court, and then waits 60 days after his appeal is denied before petitioning for review to the state's highest court. Under amici's construction of § 2244(d)(2), the prisoner, having exhausted his state court remedies, still has 125 days to spare before he must file his federal habeas corpus petition.

Turning to the second concern, one can expect *fewer* protective federal habeas filings if this Court adopts amici's position. Uncertainty is the driving force behind protective filings. A prisoner who is pursuing state post-conviction relief but is not certain whether the federal limitations period is running may opt to file a federal habeas petition to guard against the risk of losing his federal habeas claims. The clearer and simpler the tolling rules, the less reason prisoners have to file such duplicative actions. The rule that the limitations period is not tolled after a state court's denial of post-conviction relief and prior to the filing of a "properly filed application" seeking appellate review of that denial is simple to understand and apply, thus decreasing the perceived need for protective federal filings.

C. The Ninth Circuit's Construction Of § 2244(d)(2) Undermines The Limitations And Tolling Provisions' Objectives

The Ninth Circuit's construction of § 2244(d)(2) skews the balance Congress sought to attain among finality, comity, and federalism by undervaluing Congress' goal of expediting the date on which federal habeas review must be sought. Under the Ninth Circuit's approach, the one-year limitations period is tolled by months or even years when no court actually has before it a prisoner's application for post-conviction relief. Each such month or year delays the date on which a prisoner must file his federal habeas petition, thereby frustrating Congress' desire to speed up the process.

1. The Ninth Circuit alone among the courts of appeal to have addressed the issue would toll the limitations period during the entire interval between a state court's denial of post-conviction relief and the filing of an untimely, but still "properly filed," application seeking appellate review of that denial. *Compare* Pet. App. A 10-13 *with Fernandez v. Sternes*, 227 F.3d 977, 980-81 (7th Cir. 2000) (declining to find tolled the eleven months between the state court of appeals' denial of relief and the prisoner's filing of a motion for permission to file a late petition for leave to appeal, which the Illinois Supreme Court granted); *Gibson v. Klinger*, 232 F.3d 799, 806-07 (10th Cir. 2000). This unique Ninth Circuit rule opens the door to exceedingly lengthy periods of tolling. As Judge Easterbrook observed,

> Under the majority's approach in *Saffold*, if a prisoner let ten years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under § 2244(d)(2) as long as the state court denied the belated request on the merits. That implausible understanding of § 2244(d)(2) would sap the federal statute of limitations of much of its effect.

Fernandez, 227 F.3d at 980. The Ninth Circuit's recent decision in *Welch*, 267 F.3d 1013, holding that the limitations period was tolled during another prisoner's delay of over four years, confirms those fears.

The Ninth Circuit, with support from its sister circuits, has also held that the limitations period is tolled during the entire interval between a state court's denial of post-conviction relief and the filing of a *timely*

"properly filed" application seeking appellate review of that denial. *See Nino v. Galaza*, 183 F.3d 1003. *See also* cases cited in note 6 above. Under this view, for example, an appeal filed on the 30th and final day allotted by state law would toll the limitations period for the entire 30 days, even though no application was pending for the first 29 of those days. Although this rule perhaps does not create problems as extreme as those created by the Ninth Circuit's rule regarding *untimely* applications, it still fails to give full effect to the federal one-year limitations period. Moreover, in States in which the time limit on seeking appellate review of a court's denial of post-conviction relief is that the prisoner must do so within a "reasonable" time, the delays could be quite lengthy. *See, e.g.*, N.C. R. App. P. 21(c) (2001). Furthermore, as demonstrated in Section A above, this rule is unsupported by § 2244(d)(2)'s language.

2. This Court has recognized that allowing the federal courts to step into a state criminal case can impact both federalism and comity. *See Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."). The longer the gap between the conviction and the federal intervention, the greater the offense to the States' dignitary interests and the greater the practical problems. Lengthy delays before federal review rob victims of the comfort of knowing that they will not have to appear in court again or see the prisoners' convictions be overturned. Such delays also "tend to undermine confidence in the integrity of our

procedures." *Custis v. United States*, 511 U.S. 485, 497 (1994) (quotation omitted).

Moreover, one danger of federal habeas corpus is that "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle*, 456 U.S. at 127-28. The same problems would arise at evidentiary hearings ordered by federal district courts years after conviction. *Cf. Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (explaining that purpose of statutes of limitations is to "spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost"). The Ninth Circuit's rule exacerbates these problems by allowing the federal courts to intercede in state criminal cases many years after the completion of direct review. This approach thwarts the purpose of AEDPA's limitations and tolling provisions, and leaves the States and victims with very little assurance that a criminal case has truly reached its conclusion.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

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IN THE

Supreme Court of the United States

ANTHONY NEWLAND,

Petitioner,

vs.

TONY EUGENE SAFFOLD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

This case arises from a state where an unsuccessful petitioner in state habeas may seek review by filing a successive petition for an original writ in a higher court. This procedure raises the following questions:

1. Is any proceeding "pending" within the meaning of the federal habeas statute of limitations tolling provision, 28 U. S. C. § 2244(d)(2), during all or part of the interval between denial by the lower court and filing in the higher court?

2. If the answer to question 1 is yes, is there any limit on the time?

3. Does the answer to question 2 depend on an interpretation of the state court's disposition of the petition, *i.e.*, whether the state court rejected it as untimely, lacking in merit, or both?

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IN THE

Supreme Court of the United States

ANTHONY NEWLAND,

Petitioner,

vs.

TONY EUGENE SAFFOLD,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

CJLF has for many years sought to limit the abuse of federal habeas corpus to delay the finality of valid judgments in criminal cases. In 1996, Congress enacted a comprehensive reform for this purpose, of which the new statute of limitations

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

was a key component. The decision in the present case, as subsequently expanded in *Welch* v. *Newland*, 267 F. 3d 1013 (CA9 2001), mandate stayed Oct. 29, 2001, amounts to a partial judicial repeal of this statute. It gives petitioners unlimited time to delay between the stages of California collateral review. This result is directly contrary to the purpose of the statute and contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On April 3, 1990, Tony Saffold was convicted in California state court of murder, assault with a deadly weapon, and two counts of robbery, with findings of firearm use associated with the murder and robberies. J. A. 1. His conviction was affirmed, and the California Supreme Court denied review on April 15, 1992. *Ibid.* His conviction became "final," for present purposes, 90 days later, on July 14, 1992. See 28 U. S. C. § 2244(d)(1)(A) ("expiration of the time for seeking [direct] review"); Supreme Court Rule 13.1 (90 days).

Five years later, on April 17, 1997, Saffold delivered to prison authorities[2] his state petition for writ of habeas corpus for filing in the Superior Court of San Joaquin County. For prisoners like Saffold, whose conviction became final before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the one-year limitations period began running on April 24, 1996 and expired on April 24, 1997. See *Duncan* v. *Walker*, 533 U. S. 167, 150 L. Ed. 2d 251, 257, 121 S. Ct. 2120, 2123 (2001) (noting Second Circuit holding to

2. *Amicus* assumes for the sake of argument that Saffold's declaration of his dates of delivery to prison authorities, J. A. 75-76, is true, and that the mailbox rule set forth in *Houston* v. *Lack*, 487 U. S. 266, 276 (1988) applies to state habeas petitions for the purpose of the tolling provision of the AEDPA. See *Saffold* v. *Newland*, 250 F. 3d 1262, 1268 (CA9 2001). Under this rule, Saffold's April 17 delivery of his petition to prison authorities, not the May 1 filing date, would commence tolling of the limitations period.

same effect).[3] His initial filing on April 17, 1997, stopped the limitations period from running just seven days before expiration. The Superior Court denied his petition on June 9, 1997. J. A. 2. On June 14, 1997, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal, Third Appellate District. The Court of Appeal denied that petition on June 26, 1997. *Ibid.*

On November 13, 1997, after four and one-half months had passed, he filed an original petition for writ of habeas corpus in the California Supreme Court. Saffold contends he did not receive notice of the state Court of Appeal's denial until November 10, but the Ninth Circuit does not appear to have credited this claim, and its opinion proceeds on the premise that he "waited four and one-half months." *Saffold* v. *Newland*, 250 F. 3d 1262, 1265, and n. 3 (CA9 2001); see also App. to Pet. for Cert. F-4 (magistrate judge notes false statement in affidavit and warns Saffold of consequences of perjury). On May 27, 1998, the California Supreme Court denied review "on the merits and for lack of diligence." App. to Pet. for Cert. G-1.

On June 4, 1998, Saffold filed an application for writ of habeas corpus in the United States District Court, Eastern District of California. See J. A. 3. The Attorney General moved to dismiss on the ground that Saffold's application for writ of habeas corpus was barred by the statute of limitations set forth in 28 U. S. C. § 2244(d). See Pet. for Cert. 4.

The magistrate judge held that the statute "began to run again" after the Court of Appeal denied relief and had expired by the time Saffold filed in the California Supreme Court. App. to Pet. for Cert. F-5. The District Court adopted the findings and recommendations filed by the magistrate judge, granted petitioner's motion to dismiss, and ordered the case dismissed. App. to Pet. for Cert. E-2. The District Court issued a certifi-

3. The state did not seek review of the "grace period" holding in *Walker*, presumably because there was no division in the circuits on the point.

cate of appealability on the statute of limitations issue only. See App. to Pet. for Cert. D-1; 28 U. S. C. § 2253(c); Fed. Rule App. Proc. 22(b). The certificate does not mention any arguably meritorious underlying claims. It predates *Slack* v. *McDaniel*, 529 U. S. 473, 484-485 (2000).

The Ninth Circuit reversed, holding that Saffold's petition was within the limitations period. *Saffold*, 250 F. 3d, at 1266. In applying its ruling in *Nino* v. *Galaza*, 183 F. 3d 1003 (CA9 1999), it found that the District Court had erred by failing to toll the federal statute of limitation for the entire period from the initial filing in the Superior Court to the Supreme Court's dismissal. *Saffold*, *supra*, at 1265. On May 23, 2001, the Ninth Circuit filed an order denying the petition for rehearing and suggestion for rehearing en banc but amended its opinion. Pet. for Cert. 5; see App. to Pet. for Cert. C-1. This Court granted certiorari on October 15, 2001.

SUMMARY OF ARGUMENT

The central purpose of the statute of limitations for habeas cases was to move the cases along to finality by requiring the petitioner to initiate each stage of review within a reasonable time. The Ninth Circuit's rule of open-ended tolling between the stages of state collateral review would defeat that central purpose.

In California, there is no appeal from denial of habeas relief by the Superior Court, but the petitioner can file a successive petition in the Court of Appeal or Supreme Court. In the ordinary sense of the word, there is no proceeding "pending" in the interval between a nonappealable judgment and a successive petition. If any tolling rule to cover the gap is to be created, it would be a stretch of the language to cover a perceived necessity or implement an unexpressed intention of Congress. Any such stretching should be strictly limited to the necessity.

Whether a state court chooses to accept an untimely petition and decide it on the merits has no bearing on whether the federal statute of limitations clock was ticking in the interval preceding the filing of that petition. The statute of limitations is a federal rule enacted by Congress, and it has nothing to do with the doctrine of adequate and independent state grounds. The Ninth Circuit has imported a confused and problematic body of law into an area where it has no application.

In states where an unsuccessful collateral review petitioner has a fixed time to initiate review at the next level of state courts, the federal statute should remain tolled for that interval. Where there is no fixed interval for the particular procedure in state law, the federal courts should adopt the interval for the most closely analogous procedure that does have a fixed interval. In California, those intervals are 60 days to appeal a Superior Court judgment to the Court of Appeal and 10 days from finality to seek Supreme Court review of a Court of Appeal decision. Habeas petitioners seeking review via successive petitions who wait longer than other appellants should not have their federal limitation period tolled during the excess time.

ARGUMENT

I. Open-ended tolling in the intervals between state review stages would defeat the central purpose of the statute, giving dilatory petitioners the benefit of delays of their own making.

Many times in the years preceding 1996, Congress considered whether to enact a statute of limitations for habeas cases. See *Lonchar* v. *Thomas*, 517 U. S. 314, 333-334 (1996) (80 bills in 1986-1995). In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress finally adopted 28 U. S. C. § 2244(d):

"(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

"(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

"(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

"(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

"(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

Reduction of unnecessary delay has been a pivotal part of habeas corpus reform throughout its lengthy legislative history. The Powell Committee's report to the Judicial Conference in 1989 proposed habeas reform in capital cases. The committee noted that reform was needed to cure the "piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law." Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 1 (1989), *reprinted in* 135

Cong. Rec. 24,694 (1989). The committee identified serious problems with the system of collateral review that it broadly categorized as "unnecessary delay and repetition." *Id.*, at 2. A prisoner had "no incentive to move the collateral review process forward until an execution date is set." *Id.*, at 3. The committee concluded that any serious reform proposal "must address the problems of delay and repetitive litigation." *Id.*, at 4.

In 1989-1990 Congress considered the Committee's proposal, including a limitation period of six months for capital cases in qualifying states, with the filing period commencing upon the appointment of counsel or a refusal of the offer of counsel. This proposal tolled the six-month period during the pendency of all state court proceedings. See S. 1760, 101st Cong., 1st Sess., proposed 28 U. S. C. § 2256 (1989), *reprinted in* 135 Cong. Rec. 24,696 (1989). In discussing the proposal's intent, insofar as capital cases are concerned, Justice Powell stated, "The point of the180 day filing requirement is to prompt capital defense attorneys to formulate a habeas petition. Otherwise, in a capital case, there is literally no incentive to file a habeas corpus petition until it becomes absolutely necessary. If a capital defense counsel works diligently from the day of appointment, he or she will get the state habeas petition filed with time to spare." Habeas Corpus Reform: Hearings Before the Senate Committee on the Judiciary on S. 88, S. 1757, and S.1760, 101st Cong., 1st & 2d Sess., S. Hrg. 101-1253, Ser. No. J-101-49, 114 (1991).

Habeas reform did not pass in the 101st Congress or in the two succeeding Congresses. In the 104th Congress, on February 8, 1995, the House passed H. R. 729, the Effective Death Penalty Act of 1995. See 141 Cong. Rec. 4120-4121 (1995). This act carried forward the Powell Committee limitation for capital cases. See Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 5, 17 (1995). It also added a statute of limitation for all habeas cases, not just capital cases in qualifying states. This limitation began upon finality of

direct review, and tolled the limitation "during the pendency of a properly filed application for State review . . . ." *Id.*, at 2. This was substantially the limitation later incorporated into the AEDPA.

The plain purpose of the limitations statute was stated in the committee report for the House version.

> "[T]he bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings. . . . ¶ To help accomplish [this] purpose, the bill imposes periods of limitation on federal habeas corpus petitions filed under 28 U. S. C. section 2254 . . . . This reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner *diligently pursues state remedies* and applies for federal habeas review in a timely manner." H. Rep. No. 104-23, *supra*, at 9 (emphasis added).

Imposition of a statute of limitations on the filing of state prisoner petitions in federal court was considered an "essential ingredient" to any habeas reform legislation in the Congressional discussion leading up to AEDPA's enactment. See Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process, Hearing before the Committee on the Judiciary, United States Senate, S. Hrg. 104-428, 104th Cong., 1st Sess., 28 (1995) (statement of California Attorney General Dan Lungren). "One year for general habeas and 180 days for capital habeas, with tolling periods; that is, periods where you don't count the time while they are going through State review or State collateral review." *Id.*, at 74. Similarly, Gale Norton, Attorney General of Colorado said, "The first major reform is the creation of a statute of limitations for all habeas petitions. Statutes of limitations and time deadlines are common throughout the law, and applying them to habeas petitions is long overdue." *Id.*, at 59. James S. Gilmore, Attorney General of Virginia, noted "the single, most helpful thing the Congress could do to assist . . . in reducing the delay in capital cases is to

impose the filing deadlines . . . that I know you are considering." *Id.*, at 202.

In formulating the final version of the act, Congress was also cognizant of the suffering of victims' families and friends and sought to cure the painfully traumatic practice of setting an interminable series of execution dates in order to compel capital prisoners to move to the next level of review. Texas Attorney General Dan Morales summarized these concerns, "Establishing statutes of limitations for the filing of Federal habeas applications . . . serves both to streamline litigation and to alleviate the pain of victims' families and friends, who under the current system endure an endless series of execution dates set *only to compel the inmate to move to the next stage of litigation*." *Id.*, at 34 (emphasis added).

While the problem was most acute in capital cases, Congress did not limit the statute to such cases. It deliberately included the one-year limitation period in Chapter 153, applicable to all habeas cases. The statute serves the purpose of pushing the petitioner along through each stage of review until the federal habeas petition is filed. At that point, the federal courts can conduct their review. After conclusion of the first federal petition, the strict limitations on successive petitions, see 28 U. S. C. § 2244(b)(2), will preclude further federal review in all but the rarest cases. Pushing the petitioner to file each stage thus moves the case along to something approaching true finality.

AEDPA's undisputed purpose is to promote "the principles of comity, finality and federalism." *Williams* v. *Taylor*, 529 U. S. 420, 436 (2000). The one-year limitation period of § 2244(d)(1) "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal review." *Duncan* v. *Walker*, 533 U. S. 167, 150 L. Ed. 2d 251, 262-263, 121 S. Ct. 2120, 2128 (2001). Section 2244(d)(2) specifically "promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments." *Id.*, 150 L. Ed. 2d, at

262, 121 S. Ct., at 2127. It also "balances the interests served by the exhaustion requirement and the limitation period." *Id.*, 150 L. Ed. 2d, at 263, 121 S. Ct., at 2128. Finally, the section serves the important function of "protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued." *Ibid.* The Ninth Circuit's view destroys this careful balance. Instead, its open-ended tolling eliminates any semblance of finality and, consequently, defeats the central purpose of the statute.

Filing of habeas applications in state courts has long been a prerequisite to federal habeas. See 28 U. S. C. § 2254(b) (exhaustion rule). It would be unfair to penalize petitioners for their time spent exhausting state court remedies. For this reason, Congress included the tolling provision to insure that the Federal courts would remain accessible to the diligent petitioner. Curtailment of delay in pursuit of post-conviction remedies was a driving force behind the AEDPA legislation. It is unlikely that Congress would enact open-ended tolling that renders the one-year limitation period superfluous and ineffectual.

The limitations period serves important policy interests in the curbing of unnecessary delay by timely presentation of claims. However, Congressional intent does not include punishing petitioners for delays *beyond their control*. During the 1995 Senate Committee hearings, in response to Senator Biden's question regarding possible time limits on when petitions must be filed, Attorney General Lungren answered:

> "The general limitation period of 1 year and the Powell Committee provision both contain tolling provisions which will extend the filing deadlines. This is not meant to be a criticism in that we all agree that the petitioner should not be punished for *delay beyond his or her control*." Federal Habeas Corpus Reform, S. Hrg. 104-428, *supra*, at 146 (emphasis added).

Any argument for a lenient interpretation of "pending" based on policy must necessarily be limited to what is necessary to protect the *diligent* petitioner from circumstances beyond his control. An interpretation that rewards the dilatory petitioner for delays of his own making would be contrary to the purpose of the statute.

II. No proceeding is "pending" in the period between successive petitions, even if the second petition has a *de facto* appellate function.

The present case does not involve an appeal from the denial of state habeas. Instead, it involves three state habeas petitions, filed in the trial, intermediate appellate, and state supreme courts, respectively. Analysis of the case must begin with the procedure actually invoked in the case.

The traditional rule in both English and in American courts was that an order denying habeas relief is not appealable, absent a statute authorizing such an appeal. The petitioner could instead file another application with another court. See W. Church, Habeas Corpus § 386, pp. 570-571 (2d ed. 1893); *id.*, § 389, at 580. Throughout most of the nineteenth century, this Court's review of the decision of lower courts in habeas matters was accomplished through successive original petitions in this Court. See *Ex parte Yerger*, 8 Wall. (75 U. S.) 85, 97-100 (1869) (discussing cases to that point).

By the late nineteenth century, statutes allowing appeals were the clear trend. See Church, *supra*, § 389g, at 601-602. Yet the California Legislature has not authorized such appeals, and the traditional rule remains in force. The defendant cannot appeal a denial of habeas relief by the superior court and must file a new petition with a higher court. See *People* v. *Gallardo*, 77 Cal. App. 4th 971, 985-986, 92 Cal. Rptr. 2d 161, 171 (2000); 6 B. Witkin & N. Epstein, Cal. Criminal Law, Criminal Writs § 80, p. 611 (3d ed. 2000). This new petition is a successive habeas petition. It is not, of course, subject to the

restrictions on successive petitions at the same level, presenting repetitive or piecemeal claims. *In re Clark*, 5 Cal. 4th 750, 767, n. 7, 855 P. 2d 729, 740, n. 7 (1993).

With appeals, there is some ambiguity as to whether the filing of the appeal is the commencement of a new case. Compare *Slack* v. *McDaniel*, 529 U. S. 473, 482 (2000), with *Mackenzie* v. *A. Engelhard & Sons Co.*, 266 U. S. 131, 142-143 (1924). With successive petitions, there is none. This can be seen clearly from the fact that the successive petition in the higher court is not necessarily limited to review of the issues considered in the lower court. The statute expressly contemplates addition of new issues. See Cal. Penal Code § 1475.

To be sure, this Court did hold in *Yerger* that review through a successive petition was an exercise of appellate jurisdiction. See 8 Wall., at 102-103. That was a stretch made necessary by the peculiarities of this Court's constitutional jurisdiction, *i.e.*, the *Marbury* problem. See *Ex parte Bollman*, 4 Cranch (8 U. S.) 75, 100-101 (1807) (distinguishing *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 175 (1803)); but see *id.*, at 104-105 (Johnson, J., dissenting). In other jurisdictions where this was not an obstacle, the *de facto* review via a successive petition was understood to be original and not appellate jurisdiction. See Church, *supra*, § 389g, at 601.

In *Yerger*, the term "appellate" in Article III of the Constitution was stretched to accommodate the imperative necessity of full habeas review, given the importance of freedom from illegal detention in our system of constitutional values and the role of habeas corpus in enforcing that freedom. See 8 Wall., at 95-96. Similarly, in *McFarland* v. *Scott*, 512 U. S. 849, 858 (1994), the concept of when a habeas corpus proceeding is "pending" within the meaning of 28 U. S. C. § 2251 was stretched nearly to the breaking point because of the perceived necessity to avoid execution of a capital defendant before counsel could prepare a habeas petition. Absent such compelling considerations, this Court has refused to stretch statutory language, has turned aside diffuse claims of "unfairness," and

enforced the habeas statutes as written, including the very statute at issue here. See *Duncan* v. *Walker*, 533 U. S. 167, 150 L. Ed. 2d 251, 263-264, 121 S. Ct. 2120, 2129 (2001).

Nothing in the statutory language requires or even suggests that a successive petition is "pending" in the interval between its filing and the dismissal of the prior petition by a lower court. "Pending" means "[r]emaining undecided; awaiting decision." Black's Law Dictionary 1154 (7th ed. 1999). A case cannot be considered remaining undecided when it has been decided and there is no appeal, merely because the decision is not res judicata and the issue may be redecided in another proceeding. If such a gap-covering mechanism is to be created, it can only be as a stretch of statutory language to cover a perceived necessity or to implement an unexpressed intention of Congress. If such a stretch is to be made, *amicus* submits that the Court should recognize it as such and stretch no further than the exigency requires.

The Ninth Circuit believed that its approach was necessary to "permit state courts to address the merits of the petitioner's claim." *Saffold* v. *Newland*, 250 F. 3d 1262, 1267 (2001). Tolling the limitation period between successive petitions is not necessary for this purpose. The petitioner himself has the ability to get his case before the state courts in a timely manner. He need only file his Superior Court petition within ten months of finality on direct review. Even if there is no tolling in the gaps at all, he would still have as much time as appellants have to file in the state Court of Appeal. See Cal. Rules of Court 2(a) (60 days from notice). If denied there, he has the same right as any other appellant to file a petition for review with the California Supreme Court, rather than a new original petition as Saffold chose to file. See Cal. Penal Code §1506. If he runs out of time, it is the result of his own delay.

Another reason asserted for unlimited tolling in the gaps is that failure to toll would force the petitioner to file a premature federal petition before exhaustion to preserve his eventual federal review. See *Saffold*, 250 F. 3d, at 1267. For the reasons

just noted, the diligent petitioner is not forced to do so. To implement the purpose of the statute to push petitioners along to each stage, see *supra*, at 9, the dilatory petitioner should not be permitted to do so. Instead, *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982) should be applied to dismiss any such attempt to do an end run around the statute.

In part IV, *infra*, we will propose a rule that is congruent with the purpose of the statute and more than sufficient to meet the legitimate needs of diligent petitioners. First, though, it is necessary to dispose of a red herring in the Ninth Circuit's opinion in the present case.

III. Whether a state court waives a state timeliness rule has no bearing on when a petition is "pending" for the purpose of § 2244(d).

In the present case, habeas petitioner Saffold waited four and one-half months between denial of his second petition by the state Court of Appeal and filing of his third petition in the California Supreme Court. See *Saffold* v. *Newland*, 250 F. 3d 1262, 1266 (CA9 2001). The Ninth Circuit interpreted the California Supreme Court's disposition of this petition as addressing the merits, and it further concluded that this disposition meant that the tolling period included the entire gap. See *id.*, at 1267-1268. In so concluding, the court conflated the statute of limitations with the doctrine of adequate and independent state grounds. "We fail to see why an untimeliness ruling entangled with the federal constitutional merits, which is insufficient to cause a default of a federal claim, should be sufficient to defeat tolling of the AEDPA limitation." *Id.*, at 1267. This is a *non sequitur*. The two rules have entirely distinct bases, and equating the two is fundamentally erroneous.

On direct review, a state-court holding on an adequate and independent state ground negates the basis of this Court's jurisdiction. That is, if the questions this Court has jurisdiction to review under 28 U. S. C. § 1257(a) have no effect on the

outcome, then there is no federal question to support jurisdiction. See *Sochor* v. *Florida*, 504 U. S. 527, 535, n. * (1992) (procedural default is jurisdictional on direct review). On habeas, procedural default is not jurisdictional, but it is still based on the adequacy of the state ground to support the judgment. See *Harris* v. *Reed*, 489 U. S. 255, 260-262 (1989). A prisoner in custody under the authority of a state court judgment is not in custody in violation of the Constitution, see 28 U. S. C. § 2254(a), if he has forfeited his attack on the judgment. See *Brown* v. *Allen*, 344 U. S. 443, 485-487 (1953).

The new statute of limitations has nothing whatever to do with the basis of the state court's denial of relief. Timely filing of the federal petition is an independent prerequisite for federal habeas relief enacted by Congress as a matter of federal law. The fact that the state may have a more generous rule and may consider on the merits petitions that Congress has barred from federal court cannot and does not lower the federal bar.

If Congress had only wanted to bar in federal court those claims that were untimely under state law, it would have done so by strengthening the procedural default rule. However, the AEDPA actually made few changes to the law of procedural default. AEDPA codified, at least in part, the rule of *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992), see 28 U. S. C. § 2254(e)(2); *Williams* v. *Taylor*, 529 U. S. 420, 434 (2000), but otherwise left the law regarding state procedural defaults largely intact. Instead, Congress enacted the new statute of limitations with the full knowledge that it will bar from federal court claims that may be considered on the merits in state court.

In a state which does not have a statute of limitations on habeas petitions, it is entirely possible for a petition filed more than 12 months after finality on direct review to be considered on the merits. See, *e.g.*, *In re Walker*, 10 Cal. 3d 764, 774, 518 P. 2d 1129, 1134 (1974) (over 20 years; facts proffered for delay disputed; claim unsupportable on the merits); see also Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lee* v. *Kemna*, No. 00-6933, pp. 20-22 (discussing propriety

of denying on the merits claims which are arguably defaulted but clearly meritless). Congress could have authorized federal review of such claims by starting the clock at the time of exhaustion of state remedies, and indeed such a limitation was initially proposed by the same Senators who later sponsored AEDPA. See S. 3, 104th Cong., 1st Sess., § 508(a) (1995) ("The limitation period shall run from . . . the date on which State remedies are exhausted . . ."). Congress decided to scrap this language and instead start the clock on the date of finality and stop it during the actual pendency of state collateral review. The important difference in the two approaches is that the petitioner's own delays in initiating state proceedings count against his federal deadline *regardless* of whether the state and its courts choose to excuse them for the purpose of state collateral review. The prisoner who waits 13 months to initiate state habeas will clearly be barred from federal habeas, even though the state courts may consider his petition timely and address the merits.

The reasons why Congress chose to deal with delay through a statute of limitations rather than a beefed-up default rule are not difficult to see. Procedural default is a murky area of the law. It requires federal-court evaluation of whether state laws are "adequate" and "independent" under standards that remain unclear after many decades of litigation. See CJLF *Lee* Brief, at 5-10; Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in Support of the Petition for Writ of Certiorari in *Stewart* v. *Smith*, No. 01-339, pp. 3-5.

Further, as the present case illustrates, a rule that depends on interpretation of the state court disposition creates perennial difficulties. In the procedural default area, this Court's precedents lay down some rules and presumptions, but the results have been less than fully satisfactory. *Michigan* v. *Long*, 463 U. S. 1032, 1040-1041 (1983) created a presumption of disposition on federal grounds in certain direct review cases. That presumption causes little harm on direct review, since, if the presumption turns out to be incorrect, the state court can

always reassert the state ground on remand. See, *e.g.*, *Commonwealth* v. *Labron*, 547 Pa. 344, 345, 690 A. 2d 228, 228-229 (1997). On habeas, though, there is no remand, and valid judgments that actually rest on independent state grounds are routinely overturned based on a presumption that is doubtful to begin with and easily misapplied. Ten years after *Coleman* v. *Thompson*, 501 U. S. 722, 740 (1991) and twelve years after *Harris* v. *Reed*, 489 U. S. 255, 264, n. 10 (1989), we still regularly see decisions such as the Ninth Circuit's opinion in the present case, brushing aside the state supreme court's clear statement of both the procedural default and the merits as alternative grounds. See *Saffold*, 250 F. 3d, at 1267. The real and fabricated interpretive difficulties with independent state grounds should not be exported to the statute of limitations, where the basis of the rule does not require interpretation of the state decision.

Worst of all, procedural default law as applied by the Ninth Circuit creates a perverse incentive for states to adopt severe default rules with narrow or no exceptions. In *In re Robbins*, 18 Cal. 4th 770, 811-812, and n. 32, 959 P. 2d 311, 338-339, and n. 32 (1998), the California Supreme Court clarified and arguably narrowed its "error of constitutional magnitude" exception in evident response to the Ninth Circuit's dubious decision in *Siripongs* v. *Calderon*, 35 F. 3d 1308 (1994). Decisions such as the present case may be expected to result in further curtailment of delayed petitions, either through case law, rule of court, legislative statute, or initiative, if that is the only way to have the federal limitation meaningfully implemented. Cutting off state and federal remedies in one swoop would not be to the benefit of habeas petitioners generally, but it is the natural consequence of a line of decisions that punishes states for generosity.

The principal advantage of a statute of limitations over a "delayed petition" rule is clarity. Shortly before enactment of the AEDPA, *Lonchar* v. *Thomas*, 517 U. S. 314, 326-327 (1996) held that even a multi-year delay did not authorize

dismissal without a showing of prejudice, a nebulous requirement at best, and noted the debate over the appropriateness of such a rule. *Id.*, at 328. That debate concluded with the enactment of § 2244(d).

Clarity in deadlines serves the interest of both the prisoner and the state. The prisoner knows when he must get his papers in. The state knows when its judgment is truly final. The Ninth Circuit's approach robs the state of its finality and simultaneously sets a trap for the prisoner. By false analogy to independent state grounds, an untimely successive petition tolls the statute during the gap period if and only if the state court accepts the untimely filing or if its rejection for untimeliness somehow lacks adequacy or independence. This is not known or knowable to the petitioner at the time when the clock may or may not be running.

The Seventh Circuit called this the "Cheshire cat-like quality" of the *Saffold* approach. *Fernandez* v. *Sternes*, 227 F. 3d 977, 980 (2000). Whatever it is called, it is inimical to the clarity and certainty that a statute of limitations should provide. The complexity and confusion of the independent state grounds doctrine should not be imported into the statute of limitations. State courts can and should accept or reject untimely filings in the exercise of whatever discretion state law gives to them. Their orders should be summary dispositions or full opinions according to the needs of the case and the state judicial system, and not with a glance over the shoulder to federal habeas. Cf. *Coleman*, 501 U. S., at 738-739 (declining to "tell state courts how they must write their opinions"). The state court's decision to accept or reject an untimely petition should have no bearing on whether the federal limitation clock was ticking in the interim.

IV. Any "tolling in the gaps" between stages of state collateral review should be limited to a definite state time limit, whether directly applicable or "borrowed."

For the reasons discussed in part II, *supra*, any tolling in the intervals between successive petitions in California can only be based on inference of the policy Congress intended and not on the wording of the statute or the common understanding of a proceeding being "pending." If such tolling is to be allowed, it must be limited in duration so as to effectuate and not defeat the purpose of the statute.

Any inference of Congressional "intent" on this point must be made with the understanding that the members of Congress who voted for this Act probably did not think about the precise problem at all. Cf. *Beecham* v. *United States*, 511 U. S. 368, 374 (1994) (noting that determining what legislators would have thought about a particular case is a "hopeless" task). *Amicus* has found no indication in the legislative history that the issue even came up. When Congress specified tolling while a state proceeding was "pending," its members probably envisioned state systems similar to the system for federal prisoners under 28 U. S. C. § 2255. Under that system, there is a fixed and relatively short time for appeals in the normal course of procedure. See Fed. Rule App. Proc. 4(a)(1)(B) (60 days when U. S. is a party); Rule 11 of the Rules Governing Section 2255 Proceedings in the United States District Courts ("§ 2255 Rules") (adopting FRAP 4(a)). If the petitioner is unsuccessful on appeal, the time to seek certiorari review in this Court is also definite. See 28 U. S. C. § 2101(c); *Heflin* v. *United States*, 358 U. S. 415, 418, n. 7 (1959).

We can also draw some inferences about the meaning of "pending" from cases on 28 U. S. C. § 2251 and its predecessor. The predecessor statute provided an automatic stay of state proceedings "against" the petitioner while the federal "proceedings or appeal" were "[p]ending." See *In re Jugiro*, 140 U. S. 291, 295 (1891) (quoting Rev. Stat. § 766). In *Rogers* v. *Peck*, 199 U. S. 425, 427 (1905), the governor granted a reprieve

immediately after the federal District Court denied relief, to give the petitioner time to appeal. The petitioner then ungratefully attacked this action as violating the automatic stay. This Court rejected the argument on the ground that the action was not "against" the petitioner, not on the ground that no proceeding was pending. See *id.*, at 437. *Rogers* could be read to imply that a proceeding was pending in the interval. But see *Webster* v. *Fall*, 266 U. S. 507, 511 (1925) (no precedent established for questions which are not discussed but "merely lurk in the record").

Jugiro addressed the meaning of "pending" regarding a much more attenuated possibility of further proceedings. In that case, the state court set a new execution date a week after this Court's decision on the first habeas petition, without waiting for the mandate to issue. See 140 U. S., at 292. Jugiro claimed this action was void because the first habeas proceeding was still pending. See *id.*, at 294-295. The Court rejected the argument, holding that "the appeal . . . was no longer pending," *id.*, at 295, notwithstanding the possibility that the Court might yet "suspend or set aside its own judgment." *Id.*, at 296.

From these cases we can infer a principle that a case may be considered pending when further review remains available in the normal course of procedure, *i.e.*, via a timely petition or notice of appeal, but that the mere possibility of further review, such as rehearing in the rendering court or allowance of an untimely petition, does not keep "pending" an otherwise final case. As applied to a system like that governed by Federal Rules of Appellate Procedure 4(a), a case would be pending during the normal time of subdivision (1) or during the actual consideration of a motion under subdivisions (5) or (6), but the mere possibility that a motion could be filed under subdivisions (5) or (6) would not keep an action pending until the motion is actually filed.

The difficult question arises when "timely" and "untimely" are not precisely defined intervals but instead are matters of

judgment. *Amicus* suggests that the guiding principles for this situation may be drawn from the cases involving "borrowed" statutes of limitations.

Congress often creates causes of action without specifying a statute of limitations. See *Board of Regents* v. *Tomanio*, 446 U. S. 478, 483 (1980). It is well established that in these circumstances courts will "assume that Congress did not intend to create a right enforceable in perpetuity." *Felder* v. *Casey*, 487 U. S. 131, 140 (1988). The usual solution is to borrow the most closely analogous state statute, see *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 464 (1975), provided that a state limitation will not be adopted if it is "inconsistent with the federal policy underlying the cause of action under consideration." *Id.*, at 465.

States remain free, for the purpose of their own consideration of federal claims, to adopt open-ended rules of timeliness along the lines of Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts. Congress has made no attempt to preempt these rules. Cf. *Felder*, *supra*, at 138. However, these rules do not control when the clock is running for the purpose of the statute governing the subsequent filing in federal court. As discussed, *supra*, at 15, it is beyond dispute that a claim considered timely in state court may be barred from federal review for delay preceding the initial filing. By the same token, it would be inconsistent with the policy of the federal statute to permit a state's open-ended timeliness rule for the intervals between state courts to permit indefinite delay.

Amicus suggests that where state law provides no definite time period to initiate review in a higher court, the federal statute be tolled for the period prescribed by state law for the most closely analogous procedure which does have a definite limit. Where a successive petition is used as a *de facto* appeal from the trial court to the intermediate appellate court, the habeas petitioner should have as much time as regular appellants in civil cases, and no more. Cf. § 2255 Rule 11 (adopting civil case limit). The general rule in California is 60 days. See

Cal. Rules of Court 2(a). As applied to the present case, this would easily cover the gap between the Superior Court's denial of relief on June 9, 1997, and Saffold's application to the Court of Appeal only five days later.

For the next level, the proper tolling period is even more obvious. Saffold had the same right as any other unsuccessful Court of Appeal litigant to ask the California Supreme Court for discretionary review. See Cal. Penal Code § 1506.[4] For a summary denial of an original habeas petition not consolidated with the appeal, the petitioner has ten days. See Cal. Rules of Court 28(b) (10 days from finality in Court of Appeal), 24(a) (summary writ denials final immediately, with exception for habeas consolidated with appeal); *People* v. *Pendleton*, 25 Cal. 3d 371, 382-383, n. 2, 599 P. 2d 649, 656, n. 2 (1979) (finality rules, predates exception noted above); Fisher, Writs in California State Courts § 2.146, p. 321, in Appeals and Writs in Criminal Cases (CEB J. Bishop ed., 1st ed. 1982); *id.*, at 172 (1998 Supp.). This is a tight deadline, to be sure, but not an unreasonable one.

Instead of petitioning for review, Saffold waited four and one-half months and filed an original writ petition, which the California Supreme Court denied for lack of diligence as well as lack of merit. App. to Pet. for Cert. G-1. Not only did the Ninth Circuit hold that the entire period was tolled in this case, but in a subsequent case that court held that its decision in the present case required tolling the entire time for a petitioner who waited over *four years* to file a successive original petition

4. This section has not been amended since 1975. As a result, it still uses the term "hearing in the Supreme Court." The procedure was redesignated "review" in 1984. The differences between "hearing" and "review" are not pertinent to this case. See 9 B. Witkin, Cal. Procedure, Appeal § 860, pp. 895-896 (4th ed. 1997) (summarizing the change). It is discretionary review, and it is granted primarily to resolve conflicts in the lower courts or settle particularly important questions. It is functionally equivalent to certiorari in this Court. See *id.*, §§ 861, 863, at 896, 898.

raising different grounds. *Welch* v. *Newland*, 267 F. 3d 1013 (CA9 2001).[5] A rule more contrary to the purpose of this statute is difficult to imagine.

There is no reason to toll the statute any longer for one mode of review than for the other. Although filing an original petition remains a proper procedure, see *In re Clark*, 5 Cal. 4th 750, 767, n. 7, 855 P. 2d 729, 740, n. 7 (1993), the policies underlying the federal statute do not depend on the choice. The definition of "pending" may be stretched to give the prisoner who files a successive writ application *as much* time as the one who files a petition for review; there is no justification in language or policy for giving him *more* time.

When a California prisoner has been denied habeas relief by the Court of Appeal, the federal limitation period should begin running again when the time to petition for review in the California Supreme Court expires. The time should continue to run until an original writ petition has actually been filed with that court. In the present case, Saffold's 12 months had long expired by the time he filed his petition. Regardless of how the California Supreme Court's disposition of the petition is interpreted, Saffold did not meet the deadline established by Congress for a federal habeas petition. The District Court correctly dismissed it.

5. The Ninth Circuit has stayed its mandate in *Welch* pending this Court's decision in the present case.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

November, 2001

Respectfully submitted,

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BRIEF

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In the
Supreme Court of the United States

ANTHONY NEWLAND, Warden

Petitioner,

v.

TONY EUGENE SAFFOLD,

Respondent.

On Writ of Certiorari
to the Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENT

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1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4b (4th ed. 2001) 8

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE

The NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice.[1] NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. In this case, the NACDL is concerned because reversal of the Ninth Circuit's decision will adversely affect hundreds of pro se habeas petitioners by depriving them of any federal habeas merits review.

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL or NAFD, made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the NAFD's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

SUMMARY OF ARGUMENT

1. With all due respect to the parties and the courts below, it appears to us that the issue has not been properly framed. Respondent Saffold's conviction became final long before the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA) and its new statute of limitation on federal habeas corpus petitions. Application of the limitation period to habeas corpus petitioners such as Mr. Saffold violates the Constitution's Due Process Clause, as circuit courts have unanimously held. Accordingly, the courts have crafted a "grace period" within which such petitioners can file their federal habeas petitions. The AEDPA tolling provision, 28 U.S.C. § 2244(d)(2), by its express terms, applies only to the limitation period "under this subsection," i.e., the limitation period set forth in section 2244(d)(1), not the judicially created grace period, and therefore does not apply, as such, to this case.

It is incorrect, we submit, to attempt to resolve this case by parsing the precise terms of section 2244(d)(2) to divine what Congress intended by the word "pending" in

that statute, because section 2244(d)(2) does not apply to this case. It is not entirely irrelevant, however, because in determining what is a "reasonable time" under the grace period, this Court should take into account the policy considerations that led Congress to enact the tolling provision. As this Court stated in *Duncan v. Walker*, 533 U.S. 167, 121 S. Ct. 2120, 2127-28 (2001), the tolling provision is intended, in large part, to promote the exhaustion of state remedies. Accordingly, we submit that a reasonable time for filing a federal petition for prisoners whose convictions became final before the AEDPA is a one-year period from the AEDPA's enactment date, but excluded from that period should be the time reasonably necessary to exhaust state remedies with respect to federal claims affecting the judgment attacked by the federal habeas petition, and then to prepare and file a federal habeas corpus petition. This rule promotes federalism, comity, and finality, without depriving state prisoners of their right to obtain federal court review of properly exhausted federal questions about the validity of their convictions and sentences.

2. For the reasons discussed under Point 1 of this Brief, or for those advanced by the respondent, this Court should affirm the judgment of the court below. If the Court reverses the judgment, however, then any rule it announces that is less favorable than that heretofore adopted by the circuits should be applied prospectively only. In a line of cases extending from *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to *Ryder v. United States*, 515 U.S. 177 (1995), this Court has recognized that retroactive application of newly announced constructions of statutes of limitation can produce "grave disruption or inequity." *Id.* at 184. A decision in favor of the Warden would overrule clear precedent of the lower courts,

impair the purposes that the habeas corpus statute is designed to protect, and be manifestly inequitable. This case thus satisfies the factors articulated in *Chevron Oil* to justify a purely prospective application of any rule the Court may announce that would be adverse to the interest of prisoners who exhausted their state remedies and then filed a federal habeas corpus petition in good faith reliance on a fair construction of the AEDPA, under the developing case law of the lower federal courts.

ARGUMENT

I.

The Decision of the Court Below Should Be Affirmed On the Ground that Mr. Saffold Filed His Federal Habeas Petition Within a Reasonable Time Under the

§ 2241(c)(1)-(4); *Lackawanna County Dist.Attorney v. Coss*, 532 U.S. 394, ___, 121 S. Ct. 1567, 1573 (2001).

In non-capital cases, practical considerations also counseled against a delay in challenging one's conviction. As time passes, memories may fade, witnesses may die or become difficult to locate, documents may be lost. Petitioners have the burden of proof to establish their entitlement to habeas relief, and face various adverse presumptions (*e.g.*, 28 U.S.C. § 2254(d)); thus, delay was ordinarily not in prisoners' practical interests. *See* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 5 ("[i]In contrast [to capital habeas petitioners], prisoners serving an ordinary term of years have every incentive to bring their claims

properly filed state post-conviction petition for post-conviction relief is "pending." The limitation provision and tolling provision work in tandem; the former promotes the interest of the finality of state court judgments by establishing an explicit time period within which to file a federal petition, against which the latter balances the interests of federalism and comity underlying the requirement that petitioners exhaust their claims in state court before filing their federal petition. *Duncan v. Walker*, 533 U.S. 167, ___- ___, 121 S. Ct. 2120, 2127-28 (2001).

In cases such as Mr. Saffold's, however, where the statute of limitation, as set forth in 28 U.S.C. § 2244(d)(1), had expired prior to the enactment of the AEDPA, the statute cannot be applied because it would violate the Due Process Clause of the Fourteenth Amendment. "The

This judicially created grace period is consonant with a long line of precedent of this Court. *See Texaco v. Short*, 454 U.S. 516, 527 n.21 (1982); *Wilson v. Iseminger*, 185 U.S. 55, 63 (1902); *Terry v. Anderson*, 95 U.S. (5 Otto) 628, 632-633 (1877); *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 599-600 (1873).

The parties herein and the lower courts proceeded on a fundamentally flawed assumption that this case hinges on a precise and literal interpretation of the statutory tolling provision. That provision applies, by its express terms, only to the limitation period "under this subsection," 28 U.S.C. § 2244(d)(2), *viz.*, the limitation period set forth in section 2244(d)(1). As discussed above, that limitation period cannot constitutionally be applied to this case. Instead, this case is governed by a "grace period" -- a judicially devised equitable doctrine applied

As noted above, the circuit courts have unanimously held that one year is a "reasonable" amount of time for the grace period. *See, e.g., Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc) ("Section 2244(d) is short enough that the 'reasonable time' after April 24, 1996, and the one-year statutory period coalesce"), *rev'd on other grounds and remanded*, 521 U.S. 320 (1997). The rule cannot end there, however. Because this Court requires prisoners to first exhaust their claims in state court, the grace period must also accommodate the exhaustion doctrine. *Cf.* 28 U.S.C. § 2244(d)(2). This Court should hold, therefore, that for prisoners whose convictions became final before the AEDPA's enactment, a federal habeas petition will be considered timely if filed within a one-year period after April 24, 1996. Excluded from that one-year grace period should be the time reasonably necessary to exhaust state remedies with respect to federal claims affecting the judgment attacked by the federal habeas petition, and then to prepare and file a federal habeas corpus petition.[2] *See O'Sullivan v.*

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2. Habeas petitioners should also be afforded a reasonable period of time, after receiving notice from the state's highest court of the denial of the state application, to filing a federal habeas petition. We suggest the Court adopt the thirty-day period from Rule 4(a)(1)(A), Federal Rules of Appellate Procedure, given the civil nature of habeas corpus, and the parity of direct appeal and habeas corpus review. *See* 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4b (4th ed. 2001).

This is not to suggest, however, that the prisoner's state post-conviction application does not remain "pending," for post AEDPA cases actually governed by

Boerckel, 526 U.S. 838 (1999) (requiring habeas petitioners to present claims to states' highest courts).[3]

Applying this rule to the facts of this case, one must conclude that Mr. Saffold's federal habeas petition was timely filed. While he did not file his federal petition on or before April 24, 1997, he had by that time filed a state application challenging his conviction. His federal petition was filed only eight days after the state's highest court denied his state application.

We have no quarrel with the Warden's position that it is the Court's task is to construe what Congress has enacted and that examination of the language of "'the statute'" is where such task begins. Petitioner's Brief at 21 (quoting *Walker*, 533 U.S. at ___, 121 S. Ct. at 2124). The Warden proceeds immediately to parse the tolling provision, and it is here that we part company. The tolling provision applies, by its express terms, only to the "period of limitation *under this subsection*." 28 U.S.C. § 2244(d)(2) (emphasis added). This Court's task begins, therefore, with examination not of the tolling provision but of the limitation provision. As discussed above,

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section 2244(d)(2)'s terms, for the additional time during which certiorari could be sought, or if sought remains before this Court. The better construction of section 2244(d)(2) does continue the tolling for that additional time.

3. Excluding the time required to exhaust remedies also respects Congress' view, expressed in section 2244(d)(2), that it is reasonable to toll the statute of limitation – in cases to which it applies – while claims are being presented to the state court.

because the Constitution prohibits the narrow application of the limitation provision to this case, the exact words of the statutory tolling provision are not controlling.

II.
If this Court Holds that the Tolling Provision Applies and that the Time Between a State Court's Decision Denying a Post-Conviction Application and the Filing of a Subsequent Application Is Not Tolled from the Limitation Period, the Holding Should Be Applied Prospectively Only Because It Would Overrule Clear Precedent, Contradict the Purposes of the Habeas Corpus Statute, and Be Manifestly Inequitable In This Case.

Even if this Court were to reverse the judgment of the court below, it should declare its ruling to be prospective only.[4] A long line of cases, beginning with *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), has refused to apply newly-specified statutes of limitation retroactively to bar suits that, under controlling precedent, were otherwise filed in a timely manner. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 761-62 (1995) (Kennedy, J., concurring) (noting " long tradition of judicial authority to formulate rules ensuring fair and predictable enforcement of statutes of limitations, for instance, through rules pertaining to tolling or waiver"); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v.*

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4. If the Court holds that the tolling provision applies, we believe Mr. Saffold's construction of the statute best effectuates its plain meaning and promotes the principles of comity, finality, and federalism that underlie the AEDPA. The argument set forth in the text in Section II is presented in the alternative.

Gilbertson, 501 U.S. 350, 370 (1991) (O'Connor, J., dissenting); *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990); *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).[5] Because a ruling in Petitioner's favor would meet all three of the so-called "*Chevron Oil* factors," it should be applied – if it is to be applied at all – prospectively.

In *Chevron Oil*, the issue was whether a federal or state statute of limitation applied to the plaintiff's cause of action. This Court held that the state statute of limitation applied, but it noted that because the plaintiff filed his suit in compliance within the then-prevailing federal statute of limitation, it "must consider the [plaintiff's] argument that the state statute of limitations should be given nonretroactive application." 404 U.S. at 105. The Court considered three "separate factors:"

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed

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5. While the majority opinion in *Ryder v. United States*, 515 U.S. 177, 184 (1995), may have cast a cloud over the "continuing validity" of *Chevron Oil* after *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), and *Reynoldsville Casket Co.*, 514 U.S. 749, it acknowledged that "grave disruption or inequity involved in awarding retrospective relief" might "bring [the *Chevron Oil*] doctrine into play." *Id.* at 184. As discussed below, retroactive application would result in precisely such grave inequities.

> that we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

404 U.S. at 106-07 (citations and internal quotations omitted).

After noting that its holding overruled a long line of circuit decisions, the Court held that it would be "anomalous indeed" to bar the plaintiff's lawsuit retroactively. "A primary purpose underlying the absorption of state law as federal law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies. Yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." 404 U.S. at 107-08 (citation omitted). The Court reasoned that the plaintiff could not have "slept on his rights" at a time when he could not have known the time limitation that the law imposed on him. It concluded that the right to recover for allegedly serious injuries that "may significantly undercut [the plaintiff's] future earning power" was entitled to the protection of nonretroactive application, which "here simply preserves his right to a day in court." 404 U.S. at 108.

In this case, the first *Chevron Oil* factor is plainly met – as the Warden forthrightly acknowledges, his proposed interpretation of "pending" is at odds with "the line of circuit court cases providing for tolling during the gaps between tiers of state collateral review." Petitioner's Brief at 8. Indeed, every circuit to have considered the issue appears to have rejected "the gap theory."[6] A ruling in the Warden's favor, therefore, would *both* "overrul[e] clear past precedent on which litigants may have relied," and "decid[e] an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106.

Similarly, the second *Chevron Oil* factor – whether retroactive application would be inconsistent with the purpose of the underlying statute – militates sharply in

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6. *See* Petitioner's Brief at 40-46 (citing *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001); *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000); *Mills v. Norris*, 187 F.3d 881 (8th Cir. 1999); *Barnett v. Lemaster*, 167 F.3d 1321 (10th Cir. 1999); *Peterson v. Gammon*, 200 F.3d 1202 (8th Cir. 2000); *Swartz v. Meyers*, 204 F.3d 417 (3d Cir. 2000); *Gibson v. Klinger*, 232 F.3d 799 (10th Cir. 2000); *Melancon v. Kaylo*, 259 F.3d 401 (5th Cir. 2001). To this list should be added the decisions in *Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999), *aff'd on other grounds*, 531 U.S. 4 (2000), *Payton v. Brigano*, 256 F.3d 405, 408 (6th Cir. 2001), petition for cert. filed (Oct. 5, 2001), *Taylor v. Lee*, 186 F.3d 557, 560-61 (4th Cir. 1999), *cert. denied*, 528 U.S. 1197 (2000), and *Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000). The only authority in the nation for "the gap theory" is a lone district court in the Second Circuit. *See Robinson v. Ricks*, 163 F. Supp. 2d 155 (E.D.N.Y. 2001).

Mr. Saffold's favor. In a description both simple and eloquent, this Court explained that the purpose of the Great Writ is "to examine the legality of the commitment" and "to liberate an individual from unlawful imprisonment." *Ex parte Watkins*, 28 U.S. 193, 202, 203 (1830). It is a remedy that "has been for centuries esteemed the best and only sufficient defense of personal freedom," which, if withdrawn, "risk[s] injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (internal quotations omitted).

There can be no question that this important interest in human liberty is at least on par with other rights and legal interests this Court has found deserving of protection against retroactive divestiture: *viz.*, the property interests of cities, bondholders and others connected with municipal utilities, *Cipriano v. Houma*, 395 U.S. 701 (1969); the integrity of elections, *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); a state's taxation of highway use, *American Trucking Ass'ns, Inc.*, 496 U.S. 167; a State's ability to make available to its employees annuities of sex-based pension plans offered by insurance companies on the open market, *Florida v. Long*, 487 U.S. 223 (1988); the right to be free of racial discrimination in applying for tenure, *Saint Francis College*, 481 U.S. 604; the right to have non-Article III judges determine non-core issues in bankruptcy proceedings, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opn.); the authority of a police officer to initiate further conversation with an accused after the latter has invoked his right to counsel, *Solem v. Stumes*, 465 U.S. 638 (1984).

Finally, the last and most important *Chevron Oil* factor examines whether "injustice or hardship" can be

avoided by a holding of nonretroactivity. This factor weighs most heavily in favor not only of Mr. Saffold but also hundreds of other habeas petitioners who relied in good faith on this Court's assurance that as long as they properly exhausted their claims in state court, the federal habeas court would consider the merits of their claims, unless they were denied by the state court on independent and adequate state grounds. First, application of an adverse decision to Mr. Saffold would produce a substantially inequitable result given the fact that, acting *pro se*, he proceeded with appropriate (indeed astounding) alacrity in litigating his post-conviction petition through the state courts and in filing his federal petition. It is undisputed that he delivered to prison authorities his petition to the state trial court before the one-year grace period expired, and that he delivered his petition to the state appellate court only *five days* after the superior court denied the petition. *See* Petitioner's Brief at 4. While the Warden describes Mr. Saffold as "*waiting* over four and one-half months," Petitioner's Brief at 5 (emphasis added), after the denial of his habeas petition in the appellate court before filing a petition in the state's high court, according to Mr. Saffold's unrebutted declaration, he did not receive word of the appellate court's denial until November 10, 1997, Pet. App. A-9; J.A. 79, and he delivered his petition for the high court *the very same day*. J.A. 78. Eight days after the high court denied his petition, he delivered his federal petition to the prison authorities. J.A. 77. This is not the case of a petitioner who "slept on his rights."

While this Court cannot become familiar with the circumstances of hundreds of other habeas petitioners who, like Mr. Saffold, sustained convictions that became final before enactment of the AEDPA and initiated state

post-conviction challenges during the one-year grace period, it cannot be denied that a substantial percentage of them relied in good faith on decisions such as *Saffold*, *Nino v. Galaza*, and others cited in note 6, *supra*, which essentially held that the statute is tolled the entire time from the filing of the first state habeas petition until the state's highest court rejects the final collateral challenge. For this group of litigants, the retroactive application of a restrictive definition of "pending" would forever bar *any* federal merits review of claims that they are being held in custody "in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), and would risk grave injury "to an important interest in human liberty." *Lonchar*, 517 U.S. at 324. For these reasons, any ruling adverse to Mr. Saffold should be announced on a prospective basis only.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed. In the alternative, any decision adopting a narrower interpretation of the term "pending" in section 2244(d)(2) should be applied prospectively only.

Respectfully submitted,

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